

California Law Review, Inc.

The Bicentennial of the Jurisprudence of Original Intent: The Recent Past

Author(s): Boris I. Bittker

Source: *California Law Review*, Vol. 77, No. 2 (Mar., 1989), pp. 235-282

Published by: California Law Review, Inc.

Stable URL: <http://www.jstor.org/stable/3480605>

Accessed: 07/01/2010 19:10

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=clr>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



California Law Review, Inc. is collaborating with JSTOR to digitize, preserve and extend access to *California Law Review*.

<http://www.jstor.org>

California Law Review

VOL. 77

MARCH 1989

No. 2

Copyright © 1989 by California Law Review, Inc.

The Bicentennial of the Jurisprudence of Original Intent: The Recent Past

Boris I. Bittker†

The Bicentennial of the Jurisprudence of Original Intent, celebrated in 1996—less than one decade after the Bicentennial of the Constitution, launched a tidal wave of litigation. This wave as yet shows no signs of reaching its crest, let alone receding. An account of the bewildering events touched off by the so-called “Second Bicentennial” may be of interest to the readers of this journal, even though this account may become outdated almost immediately.¹

I

THE BACKGROUND OF THE “SECOND BICENTENNIAL”

As every schoolchild knows, 1996 was the Bicentennial of the Jurisprudence of Original Intent because the Supreme Court first used the phrase “intention of the framers” in 1796, when it announced in *Hylton*

Copyright © 1989 Boris I. Bittker. All Rights Reserved.

† Sterling Professor of Law Emeritus, Yale University. Part of this Article is based on remarks made as a visiting lecturer in the Enrichment Program at George Washington University National Law Center, April 6, 1988.

1. I had hoped to embellish this exposition with a full scholarly gloss, but to insure prompt publication, I was forced to confine myself to a bare bones description of the events with only a few explanatory and illustrative footnotes. For the same reason, I completed the manuscript before certain events described below occurred. While this may not exonerate me from responsibility for factual errors, I hope that readers will take my haste into account in mitigation of sentence.

I apologize to my colleagues and fellow workers in the constitutional law vineyard for submitting this Article for publication before vetting it with them. My academic habits were fully formed before the custom of vetting manuscripts with everyone in sight began. Indeed, I entered academic life thinking that only farm animals could be vetted. Thus, subject only to the inalienable defense of invincible ignorance, the author accepts full responsibility for all errors in this Article. On the other hand, should the reader find any merits herein, they need not be credited to the author's colleagues.

v. *United States*² that "[i]t was . . . obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports. The term taxes, is generical, and was made use of to vest in Congress plenary authority in all cases of taxation."³

Mighty oaks from little acorns grow. In 1895, exactly ninety-nine years after deciding *Hylton*, the Supreme Court invoked the intent of the framers more than forty times in *Pollock v. Farmers' Loan & Trust Co.*,⁴ which held that the federal income tax of 1894 was unconstitutional, thus forestalling what Justice Field feared: "a war of the poor against the rich; a war constantly growing in intensity and bitterness."⁵ With this demonstration of the framers' foresight fresh in mind, the nation might have been expected to celebrate the one hundredth birthday of the Jurisprudence of Original Intent in 1896. But its centennial came and went without, so far as the author can determine, any public recognition.

Perhaps the explanation for this curious inattention to an important anniversary lies in the relationship between the *Hylton* and *Pollock* cases. Recall that the *Hylton* case unequivocally asserted that the framers intended "to vest in Congress plenary authority in all cases of taxation."⁶ *Pollock*, by contrast, held that Congress could not tax the interest derived from state and municipal bonds.⁷ Thus, any 1896 festivities marking the Centennial of the Jurisprudence of Original Intent would have been marred by the unsettling realization, whether avowed or suppressed, that the *Hylton* case had inaugurated ninety-nine years of error and that *Pollock's* correction was only a year old. In retrospect, therefore, we can acknowledge that it was just as well that the occasion was protected by a veil of obscurity.

The second centennial of the Jurisprudence of Original Intent, however, was something else again. For one thing, the conflict between *Hylton* and *Pollock* that in 1896 may have cast a pall over the first centennial was mitigated in 1988 by *South Carolina v. Baker*,⁸ in which the Supreme Court announced that the federal government can tax interest derived from state and municipal bonds, thus repudiating *Pollock* and

2. 3 U.S. (3 Dall.) 171 (1796).

3. *Id.* at 176 (*seriatim*) (opinion of Paterson, J.); see also *id.* at 174 (*seriatim*) (opinion of Chase, J.) (Congress has power "to lay and collect taxes, of every kind or nature, without any restraint [save for the uniformity and apportionment rules], except only on exports.") (emphasis in original).

4. 157 U.S. 429 (1895) (41 references to the intent of the framers by prevailing and dissenting justices), modified, 158 U.S. 601 (1895), overruled, 108 S.Ct. 1355 (1988).

5. *Id.* at 607 (Field, J., concurring).

6. *Hylton*, 3 U.S. (3 Dall.) at 176 (*seriatim*) (opinion of Paterson, J.).

7. *Pollock*, 157 U.S. at 585-86.

8. 108 S. Ct. 1355 (1988).

rehabilitating *Hylton*.⁹ It became possible, therefore, to commemorate *Hylton* without conceding that its luster had been tarnished by *Pollock*.

The importance of original intent was highlighted by its role in the most important case of this century, *Brown v. Board of Education*.¹⁰ After hearing argument, the Supreme Court assigned the case for reargument, requesting counsel "to discuss particularly" questions relating to "the understanding of the framers" of the fourteenth amendment¹¹—a request that generated a vast historical record. Although the Court ultimately concluded that this compilation of evidence was "not enough to resolve the problem with which [the Justices were] faced,"¹² its systematic and comprehensive character contrasted sharply with the impressionistic accounts of the framers' intentions that passed muster during the preceding 150 years, and it set an example for subsequent inquiries.

A vast body of scholarly research, giving the Jurisprudence of Original Intent a systematic intellectual foundation that it had previously lacked, both fostered and buttressed judicial attention to the intent of the framers during the fifty years preceding the Bicentennial.¹³ *Primus inter pares* was William W. Crosskey's 1953 work *Politics and the Constitution in the History of the United States*, which rejected the "sophistries" of the "living-document" school of constitutional law in favor of the Constitution's "true and intended meaning."¹⁴ To arm himself and his readers "with a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas, which are needed for a true understanding of the Constitution,"¹⁵ Crosskey ransacked a daunting array of contemporaneous dictionaries, treatises, legal decisions, political pamphlets, and newspapers. He used the resulting custom-tailored lexicon to examine what his first chapter calls "Our Unknown Constitution." This erudite research led him to announce a series of unorthodox, indeed revolutionary, propositions about the originally intended meaning of the com-

9. *South Carolina v. Baker* did not rehabilitate *Hylton* in full. However "plenary" the federal power to tax natural persons and corporations may be, it may not allow Congress to tax state and local governments as such, see *id.* at 1364 n.10, 1367 n.13, and Congress' power to tax foreign diplomats and events may be constrained by international law and by jurisdictional limits implicit in the due process clause of the fifth amendment.

10. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

11. Miscellaneous Order, 345 U.S. 972 (1953) (*Brown v. Board of Education*).

12. *Brown*, 347 U.S. at 489 ("[A]lthough these sources cast some light, it is not enough to resolve the problem with which we are faced."); see also Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

13. There were some precursors to these post-World War II works. See, e.g., L. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932) and Boudin's earlier article with the same title, 26 POL. SCI. Q. 238 (1911).

14. 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1172-73* (1953). Volumes 1 and 2 were published in 1953. Volume 3, with William Jeffrey, Jr. as coauthor, was published in 1980, after Crosskey's death.

15. 1 *id.* at 5.

merce, imports and exports, ex post facto, contracts, and general welfare clauses of the Constitution, as well as about the authority originally intended to be vested in the President and the federal courts.¹⁶

Crosskey's massive and unrelenting search for the Constitution's "true and intended meaning" was followed by Raoul Berger's spate of book-length monographs, which systematically reexamined a variety of specific constitutional provisions in light of the intent of the framers.¹⁷ Like Crosskey, Berger awarded a stamp of disapproval to almost every currently accepted constitutional interpretation that engaged his attention.¹⁸

16. For a sampling of the diverse reactions to Crosskey's work, compare Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins*, 21 U. CHI. L. REV. 24, 24 (1953) ("a major scholastic effort of our times") and Hamilton, *The Constitution—Apropos of Crosskey*, 21 U. CHI. L. REV. 79, 92 (1953) ("Never has so adequate a gloss—fashioned from materials from a hundred sources—been written to an authoritative text.") with Brown, Book Review, 67 HARV. L. REV. 1439, 1456 (1954) ("insistent advocacy of the *idee fixe*, which must either mold to its purpose, or simply reject, all that it touches"); Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40, 78 ("not candid and objective . . . should be viewed with the greatest skepticism and reserve") and Goebel, *Ex Parte Clio*, 54 COLUM. L. REV. 450, 451 (1954) ("[M]easured by even the least exacting of scholarly standards, [the work] is in the reviewer's opinion without merit"). See also C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 156 n.14 (1969):

Almost no reviewer of the work, regardless of his position on Crosskey's historical arguments (or policy goals), dared to follow the author's leap across the historical chasm and agree that more than a century and a half of constitutional development should be repealed on the basis of new discoveries as to the original meaning of the constitutional document.

17. See, e.g., R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982) [hereinafter R. BERGER, *DEATH PENALTIES*]; R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974); R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987) [hereinafter R. BERGER, *FEDERALISM*]; R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) [hereinafter R. BERGER, *GOVERNMENT BY JUDICIARY*].

At first blush, Berger's basic hermeneutic principle (that the intent of the framers is controlling) might be thought to differ from that of Crosskey. Crosskey repeatedly announced his agreement with Holmes that "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417-18 (1899). Crosskey drives home his allegiance to this principle by quoting it on the title page of both volumes one and two of his work. W. CROSSKEY, *supra* note 14. Any divergence between Berger and Crosskey-Holmes, however, is merely superficial. Berger never suggests that the framers expressed their intent (whether in drafting or in explaining the Constitution) in words having an idiosyncratic meaning, rather than the meaning they would have "in the mouth of a normal speaker of English." Berger, *Judicial Review: Countercriticism in Tranquility*, 69 NW. U.L. REV. 390, 393-97 (1974). Berger also rejects the framers' "secret beliefs" and favors what they said publicly. See *id.* at 393-97.

18. Berger also resembled Crosskey in eliciting passionate admirers and equally passionate critics. Compare Hurst, Book Review, 68 NW. U.L. REV. 643, 650 (1973) ("historical craftsmanship of a high order, examining events with scrupulous care") and Nathanson, Book Review, 2 FLA. ST. U.L. REV. 209, 218 (1974) ("finest background available") with Sofaer, Book Review, 88 HARV. L. REV. 281, 284 (1974) ("tendency to assume an advocate's role and present a wholly one-sided, and therefore misleading, picture of the issues he discusses") and Winter, *The Seedlings for the Forest* (Book Review), 83 YALE L.J. 1730, 1744 (1974) ("a cramped,

The achievements of these full-time practitioners of the Jurisprudence of Original Intent inspired an army of part-timers to explore every nook and cranny of the Constitution for evidence that an imperial judiciary had subverted the intent of the framers.¹⁹ In their enthusiastic iconoclasm, they were spurred on by the movement's grand theoreticians, of whom none was more eloquent than Robert Bork. In 1990, making the most of his judicial and academic experience, he published a reasoned and eloquent manifesto, entitled *Original Intent: Our Last Best Hope*, which *Publishers' Hebdomonial Journal* described as "this year's most seductive non-fiction page-turner," daringly predicting that it would out-sell Charles Reich's *The Greening of America*.²⁰

Though it is too early to compare sales figures, it is already clear that Bork, like Reich, managed to describe, accelerate, and legitimate a powerful intellectual wave while joyfully riding its crest. Moreover, Bork's work appeared just as Academe's enchantment with noninterpretivism was drawing to a close. Noninterpretivism, which did not even purport to "interpret" the language of the Constitution, was the victim of its own success. By creating a "living constitution," it had recognized more and more constitutional options, while closing off none.

As these uncertainties increased exponentially, student tolerance of ambiguity, never robust, diminished in inverse proportion. Indeed, students at several law schools, whose faculties claimed to constitute homogeneous "interpretive communities," demanded that a "student anxiety impact statement" be issued whenever an exponent of noninterpretivism was under consideration for an academic appointment. For their part, faculties began to blame noninterpretivism for a mixed grill of academic disorders: classroom lassitude, cynicism, grade inflation, indifference to public service opportunities, and the hiding of library books just before examinations. The *coup de grace* for this previously promising intellectual movement was delivered at the December 1995 convention of the American Association of Law Schools. A symposium entitled *Who Reads Derrida Today?* was attended only by the speakers. On learning that the members of the AALS had answered the symposium's rhetorical question with their feet, a renowned sociologist of knowledge announced that "the juices of noninterpretivism have dried up, and its seeds won't

unidimensional view of constitutional law"). See also Kurland, *Foreword* to R. BERGER, *SELECTED WRITINGS ON THE CONSTITUTION* at i (1987) ("Raoul Berger is the dean of scholars of the American Constitution.").

19. For a representative sample of these specialized studies, see Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1599 n.194 (1987).

20. PUBLISHERS' HEBDOMONAL J., Apr. 1, 1990, at 1. In the jargon of the trade, "page-turner" is the superlative of "good read" and "better read." Bork's views were presaged by his article, entitled *Judicial Review and Democracy*, in 3 L. LEVY, K. KARST, & D. MAHONEY, *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1061 (1986).

produce any new shoots for at least fifty years." She added that in the meantime, the Jurisprudence of Original Intent "will undoubtedly reign in solitary splendor."

II

THE PIONEERING ORIGINAL INTENT CASES

A. *The Interstate Monopoly Case*

In 1997, just one year after the Bicentennial of the Jurisprudence of Original Intent ended, a federal district court applied the doctrine in one of the most dramatic lawsuits of our day, the justly famous *Interstate Monopoly Case*. The case involved the Sherman Antitrust Act, which, save for a passing episode,²¹ had been thought to fall snugly within the jurisdiction over interstate commerce allocated to Congress by article I, section 8 of the Constitution. After enjoying its charmed life for more than a century, the Sherman Act was held unconstitutional in the *Interstate Monopoly Case*. The weapon of death was a judgment n.o.v., after a jury found a ring of conglomerateurs (a/k/a economic royalists) guilty of conspiring to monopolize all interstate business by bringing under a single corporate umbrella every commercial enterprise in the country, save for so-called mom-and-pop stores.

Although more than one hundred of the country's largest law firms participated in defending the case, not one had thought to interpose a constitutional objection to the prosecution until the district judge asked for briefs on "the relevance of the intent of the framers to the constitutionality of the Sherman Act." Even then, the court's request baffled the lawyers until a paralegal in one of the firms, working to finance his graduate studies in American history, recalled that a primary task of the Philadelphia Convention of 1787 was to eliminate obstructions to interstate commerce that states imposed on each other. "Could it be," this humble (but, as it turned out, perceptive) graduate student asked the senior associate to whom he reported, "that the framers intended to confine the federal government's power to regulate interstate commerce to the mischief it was meant to remedy—internecine exactions by the states themselves—and to exclude private behavior?"

The paralegal's electrifying question shocked the defense lawyers into vigorous action. Within twenty-four hours, a state-of-the-art computer was programmed to compile every scrap of evidence bearing on the intended scope of the commerce clause that could be found by a quickly

21. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-13 (1894) (Manufacturing is not "commerce.")). For the decline and fall of the *E.C. Knight* doctrine, see, for example, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); 1 P. AREEDA & D. TURNER, *ANTITRUST LAW*, ¶¶ 231-233 (1978).

mustered regiment of American historians. This electronic data base was then subjected to the most exacting search in the history of American law, which confirmed a leading commentator's conclusion that "the all but exclusive domestic concern of the Founders was exactions *by States* from their neighbors."²² This statement, according to the computer, could be improved upon only by excising the words "all but." In short, in drafting and ratifying the commerce clause, the framers and founders intended the power of Congress to regulate interstate commerce to encompass *only* "exactions by sister States,"²³ not the conduct of private entrepreneurs.

Having conclusively established the intent of the framers, the court in the *Interstate Monopoly Case* moved swiftly to judgment. Relying on the "centuries-old rule of interpretation [that] an enactment is to be construed in light of the evil it was designed to remedy"²⁴ and not as a roving commission to cure the world's ills, the judge announced that the Sherman Act, tested by the Jurisprudence of Original Intent, was an unconstitutional usurpation of power by Congress.

In so ruling, the court noted that the government, seeking to validate the legislation, relied heavily on the fact that Professor Bork (as he was then), a widely acclaimed authority on the Jurisprudence of Original Intent, had written extensively about the Sherman Act without ever intimating that it was unconstitutional.²⁵ The court, however, rejected the claim that this failure to condemn the Act was tantamount to a clean bill of health, since Professor Bork had never unequivocally asserted that the legislation *was* constitutional. When a scholarly work does not discuss

22. R. BERGER, *FEDERALISM*, *supra* note 17, at 128 (emphasis added); *see also* Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 275 (1872) ("A power to prevent embarrassing restrictions *by any State* was the thing desired" by the framers.) (emphasis added); R. BERGER, *FEDERALISM*, *supra* note 17, at 130 ("reasonable to infer" that for 44 years after adoption of Constitution, no purpose for federal interstate commerce power had been thought of, other than "relief of the States which import and export through other States, from the levy of improper contributions *by the latter*") (quoting 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1066, at 10 (5th ed. 1905)) (emphasis added).

23. R. BERGER, *FEDERALISM*, *supra* note 17, at 133.

24. *Id.* at 128.

25. *See, e.g.*, R. BORK, *THE ANTITRUST PARADOX* (1978); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966). Curiously, Senator Sherman expressed doubts about the constitutionality of the legislation that ultimately, but perhaps unjustly, bore his name. When the legislation was about to be referred to the Senate Finance Committee, Sherman remarked:

I have myself given some attention to it, to see how far it is within the constitutional power of Congress to prohibit trusts and combinations in restraint of trade. It is very clear there is no such power unless it is derived from the power of levying taxes; that it is a power which must be exercised by each State for itself. . . . Whether such legislation can be ingrafted in our peculiar system of government by the national authority, there is some doubt. If it can be done at all, it must be done upon a tariff bill or upon a revenue bill. I do not see in what other way it can be done.

CONG. REC. 7513 (1888). *See generally* H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 164-210 (1954).

an issue, the judge concluded, it is best to eschew inferences drawn from what might have been, but was not, said. In this respect, she asserted, scholarly treatises should be accorded the same treatment that Justice Holmes recommended for judicial opinions: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."²⁶

Finally, the court acknowledged that the commerce clause, in empowering Congress "[t]o regulate commerce . . . among the several States,"²⁷ contains no explicit internal lexical limit on the verb "to regulate." The prosecution argued that the power must therefore be plenary, and that restricting its scope to state obstructions of interstate commerce was tantamount to rewriting the constitutional language to read "to regulate [state action interfering with interstate] commerce." The judge simply responded by quoting a central tenet of the Jurisprudence of Original Intent: "'The intention of the lawmaker is the law,' rising above even the text."²⁸ To illustrate the antiquity of this principle, the judge quoted the Commandment "Thou shalt not kill," pointing out that in accordance with the Supreme Law-Giver's intent, this seemingly unlimited prohibition is almost universally interpreted to exempt soldiers, policemen, and public hangmen when acting in an official capacity.

* * * *

After announcing her decision, the judge in the *Interstate Monopoly Case* refused to speak with reporters. Her reticence, however, did not deter her law school roommate, who was also her husband and former partner in the practice of law, from making himself available to the press. Speaking from the courthouse steps, he responded to a reporter's questions as follows:

Q. Counselor, perhaps your long association with the judge in the *Interstate Monopoly Case* will enable you to solve a puzzle for us.

A. I'll try. What's the puzzle?

Q. Well, as you know, the judge was an active member of the American Civil Liberties Union from her law school days until she

26. *Webster v. Fall*, 266 U.S. 507, 511 (1925).

27. U.S. CONST. art. I, § 8, cl. 3.

28. R. BERGER, *FEDERALISM*, *supra* note 17, at 15-16 (quoting *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903) (quoting *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 380 (1874))). The judge added that *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 227 (1899) (upholding the Sherman Act's constitutionality against a claim that the power of Congress to regulate interstate commerce does not encompass the power "to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce") took the words of the Constitution as controlling, *id.* at 229 ("we fail to find in the language of the grant any such limitation"), instead of interpreting the language, as required by the Jurisprudence of Original Intent, in harmony with the framers' intent.

became a judge. She then resigned, stating, as I recall, that she feared that continued membership might create an impression of impropriety. Now people are puzzled that someone with an ACLU background should embrace, and apply, the Jurisprudence of Original Intent.

A. Her ACLU membership is not the puzzle; it's the answer.

Q. Would you explain?

A. Have you ever been a member of the ACLU?

Q. No, but

A. Well, I have, and for forty years. In all that time, I don't think I ever received an ACLU appeal for funds that did not warn us that enemies of the Constitution were subverting the framers' intent. The ACLU, to my certain knowledge, often made the same point in its briefs. In fact, when years ago I first heard Attorney General Meese expound the Jurisprudence of Original Intent, I wondered if he was acting as an ACLU mole in President Reagan's Department of Justice.

Q. Surely you were disabused of that notion quite soon.

A. Yes, but I was so worried about the confusion resulting from the simultaneous invocation of the Jurisprudence of Original Intent by the ACLU and the Department of Justice²⁹ that I wrote to the chairman of the ACLU, suggesting that he investigate whether the ACLU had a common law copyright on the term "original intent" so the principle could be protected against exploitation by the ACLU's enemies. Alas, he did not reply.

Q. Counselor, your last remarks were fascinating, but could we return to the judge?

A. Of course.

Q. Some lawyers are saying that the judge's decision, if upheld on appeal, means the end of the National Labor Relations Board, federal minimum wage legislation, and a host of other social programs that, according to our information, the judge vigorously favored when she was in practice. Are these suppositions true?

A. First, as to the impact of the decision, I agree that its conclusion goes far beyond the Sherman Act, and that it jeopardizes lots of federal programs that were enacted in reliance on Congress' power to regulate private enterprises engaged in interstate commerce. Second, as to the judge's reaction, I can't speak for her, but in my experience, when she is gripped by a principle, she doesn't care where the chips fall. She is not result oriented. In applying the Jurisprudence of Original Intent, she will undoubtedly be guided by the principle, *fiat intentio, ruat coelum*.

29. Sometimes the confusion seems to be internalized. See, e.g., Goldberg, *Attorney General Meese vs. Chief Justice John Marshall and Justice Hugo L. Black*, 38 ALA. L. REV. 237 (1987) Former Justice Goldberg criticized Attorney General Meese because his "simplistic invocation of the Founding Fathers' intention does injustice to their vision and grand design in framing our fundamental law", *id.* at 240, while praising Justice Black for his reliance on history in supporting his incorporation theory of the fourteenth amendment, *id.* at 240-44.

B. The Alaska Toxics Case

In the same year that the *Interstate Monopoly Case* was decided, a coalition of Alaskan public health and environmental groups, restive at what they regarded as the federal government's slow pace in regulating toxic substances, managed to gain control of their state's legislature. Their political campaign drew heavily on the vision of a revitalized dual federalism that was so popular in 1987 during the Constitution's bicentennial.³⁰ The first fruit of this electoral success, discharging with a vengeance the coalition's promise to "put the 'govern' back into state government," was a statute forbidding the shipment of toxic chemicals anywhere within the state by land transportation, except under a permit granted by the state's environmental and public health agency. Moreover, cities and other political subdivisions of the state were authorized to establish local agencies, which could impose even stricter limitations on the use of local roads for transporting toxic chemicals. Acknowledging the federal government's control over the nation's navigable waters, however, the act exempted water transportation, thus permitting toxic chemicals to be paraded up and down Alaska's waterways so long as they were not unloaded without a state or local permit.

Since all transportation of toxic chemicals, in Alaska and elsewhere in the United States, whether by land, air, or water, was conducted under permits granted by federal government agencies, the chemical manufacturers did not initially take the state act seriously. But rather than merely ignoring it, they sued to restrain enforcement in the federal district court for Alaska. On the first day of trial, their lead counsel mounted the courthouse steps accompanied by four paralegals carrying bushel baskets of federal permits and a banner emblazoned with the words: "The Laws of the United States Are the Supreme Law of the Land."³¹ A bystander was heard to observe, "Yes, but only if they are made in pursuance of the Constitution." That comment, as related below, proved to be prescient.

After hearing argument, the court refused to invalidate the Alaska legislation, despite the elaborate federal regulatory and permit schemes that, according to the chemical manufacturers, preempted the field. Noting that the case was certain to be appealed and that, whether affirmed or reversed, any written opinion by him would be quickly forgotten, the

30. For the leading scholarly, as distinguished from inspirational and rhetorical, support for a revival of dual federalism, see R. BERGER, *FEDERALISM*, *supra* note 17.

31. Cf. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

judge delivered an oral opinion. Stripped of details, his remarks can be summarized as follows:

1. *Alaska's Police Power*

The legislation, embodying a reasonable method of protecting the health of its citizens, was a valid exercise of Alaska's "police power." This type of legislation was recognized as reserved to the states as early as 1824 when Chief Justice Marshall, despite his nationalist view of the Constitution, spoke of "[t]he acknowledged power of a State to regulate its police."³² This power encompassed the "immense mass of legislation . . . not surrendered to the general government," including "[i]nspection laws, quarantine laws, health laws of every description, as well as laws . . . which respect turnpike roads, ferries, etc."³³ In 1837, the Supreme Court, per Justice Barbour, in harmony with the intent of the framers, stated that "the authority of a State is complete, unqualified, and exclusive" when it exercises "those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*."³⁴

To illustrate the broad scope of this "complete, unqualified, and exclusive" authority, the judge in the *Alaska Toxics* case quoted Justice Barbour's authoritative description of the state's reserved police power:

If we were to attempt [a definition], we should say, that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it; whether related to their rights, or their duties; whether it respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a state, or of any individual within it; and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction.³⁵

The judge noted plaintiff's argument that a judgment in favor of the Alaska statute would prevent the federal government from reaching into a state's interior to cope with epidemics and infectious diseases, and would even allow each state to make its own pure food and drug law.

32. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824). Marshall was, of course, using the term "police" in its early sense, rather akin to "internal policy," not in its narrower modern connotation of a governmental force charged with maintaining law and order. See generally *infra* note 35.

33. *Gibbons*, 22 U.S. (9 Wheat.) at 203.

34. *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837) (emphasis in original). For additional references to the exclusive nature of the state's police power, see R. BERGER, *FEDERALISM*, *supra* note 17, at 142-43.

35. *Miln*, 36 U.S. (11 Pet.) at 139; see also R. BERGER, *FEDERALISM*, *supra* note 17, at 67, 71-76; T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 1223-27 (1927); E. FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904).

After stating that these issues were not before him, he observed that if these assertions were correct, there was no reason to think that the states would be less solicitous of the health of their citizens than the federal government, as the legislation before him amply demonstrated. The judge also stated that the framers had created dual federalism because of their conviction that the states were more familiar with local problems than a faraway Congress.

The judge next addressed the argument that the police power was defined broadly and vaguely in the early days of the Republic, and that if construed to be exclusive, a state could exercise its police power to invalidate federal legislation governing national economic institutions such as banking and insurance.³⁶ Acknowledging that the state's reserved police power was indeed "diversified and multifarious,"³⁷ the judge pointed out that if it were to be curtailed, the proper instrument was an amendment to the Constitution.

The judge then stated that the Constitution does not delegate to Congress any authority to supersede the state's police power. He therefore concluded that the supremacy clause, which accords precedence to valid exercises by Congress of its *delegated* or enumerated powers, had no bearing on the case before him.³⁸ Borrowing from a comment by Edmund Pendleton at the Virginia Ratification Convention, the judge said, "The police powers of the states and the enumerated powers of the federal government 'can no more clash than two parallel lines can meet.'"³⁹

2. Federal Supremacy

Assuming *arguendo*, however, that this conclusion was erroneous (and that the supremacy clause was directed not merely to state court judges, but also to the federal judiciary), the judge considered whether the federal laws regulating the transportation of toxic chemicals were "made in pursuance" of the Constitution so as to qualify under the

36. This claim was based on the fact that New York statutes of 1829 included a 100-page compilation of the state's "internal police laws," covering, *inter alia*, regulations of insurance agents, stock-jobbing, banking, and pawn-brokering. See 1829 N.Y. Laws.

37. *Miln*, 36 U.S. (11 Pet.) at 139.

38. See R. BERGER, *FEDERALISM*, *supra* note 17, at 97 ("Only *delegated* powers, however, were made 'supreme'; the Founders meant to protect the States' *undelegated* powers from federal intrusion, as Article VI makes quite clear.") (emphasis in original); see also *id.* at 70 n.109.

39. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 529 (1969); see also R. BERGER, *FEDERALISM*, *supra* note 17, at 140:

The Founders' anxiety to safeguard the States' police powers—protection of the health, safety, and morals of their citizens—from federal "intermeddling" is well documented. It should require more than the colorless "commerce among the several States" to demonstrate their intention *sub silentio* to act in derogation of assurances to allay such fears. (footnote omitted).

supremacy clause for precedence over the Alaska legislation.⁴⁰ On turning his attention to this issue, the judge conceded that at first blush, the federal government's power to regulate interstate transportation, even on state highways, hardly seemed debatable.

Nonetheless, the judge speculated orally about whether Alaska and Hawaii, being contiguous to no other states, enjoyed a constitutional status different from the other forty-eight states. "I ask myself," he told counsel, "whether trucks and railroad cars that cannot move beyond Alaska's boundaries are subject to the power vested in Congress by the commerce clause to regulate commerce *among* the several states."⁴¹ Counsel for the manufacturers quickly thought of a response to this rhetorical question: Chief Justice Marshall's statement that "the power of Congress [to regulate foreign and interstate commerce] may be exercised within a State."⁴²

But before counsel could respond, the judge announced that the "question" was more fundamental, namely, whether the commerce clause gives Congress *any* authority to regulate land transportation except on federal property? "I draw your attention," he said, "to the sobering comments in *Railroad Co. v. Maryland*":

The navigable waters of the earth are recognized public highways of trade and intercourse But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control [or] supposed that the wagons of the country, or the horses by which they were drawn, were subject to National regulation.⁴³

40. For an extensive analysis of the supremacy clause's phrase "in pursuance thereof," concluding that it means "consistent with," not merely "in consequence of," see R. BERGER, *CONGRESS V. THE SUPREME COURT* 228-36 (1969).

41. There was no evidence in the record that toxic chemicals were manufactured in Alaska and then shipped, first by truck or rail and then by water, to other states. Moreover, the manufacturers did not argue that the federal laws were exercises of Congress' power to regulate commerce with foreign nations or with Indian tribes, probably because the record did not evidence shipments to such destinations. Finally, none of the roads subject to the Alaska statute had been constructed with federal funds.

42. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

43. *Railroad Co. v. Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874); see also *Veazie v. Moor*, 55 U.S. (14 How.) 568, 574 (1852) (commerce clause excludes control over turnpikes). This repudiation of federal authority over land transportation is consistent with a much earlier attitude. At the nation's inception, there was such widespread agreement that each state had exclusive authority over the roads within its boundaries that Congress did not venture to build or repair *even postal roads* without state consent, despite its explicit constitutional power "To Establish Post Offices and Post Roads." U.S. CONST. art. I, § 8, cl. 7. When the states attached conditions to their consents, Congress meekly acceded to these limits. See L. ROGERS, *THE POSTAL POWER OF CONGRESS* 61-96 (1916); see also *Searight v. Stokes*, 44 U.S. (3 How.) 151, 151-54 (1845) (describing

Seeking to discredit the sharp eighteenth century constitutional distinction between land and water transportation, counsel for the chemical manufacturers cited a string of twentieth century commerce clause cases upholding the federal government's right to regulate transportation on state highways that affects interstate commerce.⁴⁴ To the judge, however, these cases merely documented the already familiar phenomenon that the Jurisprudence of Original Intent had fallen into alarming desuetude. "The Bicentennial of the Jurisprudence of Original Intent should be taken as a call for action, not as an exercise in nostalgia," he observed.

The judge acknowledged that technological improvements had converted the primitive roads travelled by the framers⁴⁵ into today's admirable network of high-speed highways; but, in his view, these improvements did not alter the roads' original constitutional status.⁴⁶ "The Constitution absorbs technology but is not changed by it," he announced. "Just as the federal government's authority over the nation's navigable waters did not decline when sails gave way to steam,⁴⁷ so the state's exclusive jurisdiction over its roads did not diminish when the roads were improved with planks, crushed stone, or reinforced concrete. Similarly, when in the fullness of time, technology created railroad trains and motor vehicles, they acquired at birth the same constitutional status that, by the framers' intent, was assigned to the ox-drawn wagons of 1787.⁴⁸ Let us not forget that as recently as 1874—when we already had a coast-to-coast railroad—the Supreme Court recognized that federal power to reach into the states to regulate railroads was problematic because the iron horse was merely a technological improvement on the ox-cart, which the framers had subjected to the exclusive authority of the states.⁴⁹

the legislative history of Cumberland Road); Young, A Political and Constitutional Study of the Cumberland Road 37-47 (Univ. of Chicago, doctoral dissertation, 1902). *But see* Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1137-1140 (1833) (contending that Congress had broader authority than it had so far chosen to exercise).

44. *See, e.g.,* *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954) (invalidating Illinois statute that prohibited use of state highways by federally licensed interstate motor carriers that had repeatedly violated state weight and load distribution regulations).

45. For descriptions of the nation's early roads, see G. TAYLOR, 4 THE ECONOMIC HISTORY OF THE UNITED STATES 15-17 (The Transportation Revolution, 1815-1860) (1951). For a description of the framers' difficult travels on these primitive roads, see R. BERGER, FEDERALISM, *supra* note 17, at 23-24.

46. *See* R. BERGER, FEDERALISM, *supra* note 17, at 124-25 ("Economic expansion cannot alter the meaning the constitutional terms had for the Founders, particularly when alteration results in a takeover of internal functions which the States did not dream of surrendering.").

47. *Gibbons*, 22 U.S. (9 Wheat.) at 219-21.

48. *Railroad Co.*, 88 U.S. at 474-75.

49. *Railroad Co.*, 88 U.S. at 474-75. For an exposition of Congress' reliance on its power to establish military and postal roads as a basis for regulating the railroads (thus sidestepping doubts about its authority under the commerce clause), see L. HANEY, A CONGRESSIONAL HISTORY OF

"This conclusion," the judge commented, "must not be disparaged as the perpetuation of an outdated 18th century distinction."

Federal regulation of land transportation ineluctably intrudes on state sovereignty far more than federal regulation of the nation's navigable waters, as was evident to the discerning eyes of the framers. Even if the degrees of intrusion were similar, the distinction was made by the framers. If it is to be obliterated, the proper instrument is an amendment to the Constitution, not a lawsuit before judges sworn to uphold, not alter, the Constitution.

Responding to the charge that the principles undergirding his ruling might metastasize from the state's highways to the heavens above and thus jeopardize control of the air lanes and balkanize the nation's already dangerous skies, the judge said that this issue was not before him. He ominously referred, however, to the state's "complete, unqualified, and exclusive"⁵⁰ police power to protect the health, tranquility, and safety of its citizenry, from whatever quarter a threat might come. Raising even more unsettling doubts, the judge suggested that federal regulation of air transportation might have to be confined to cargo planes because the framers did not intend Congress' power to regulate interstate commerce to encompass the movement of persons from state to state.⁵¹

* * * *

Following his decision in the *Alaska Toxics Case*, a reporter from a national legal magazine interviewed the judge. Portions of the interview are reproduced below.

Q. Judge, commentators have described your decision in the *Alaska Toxics Case* as the most dramatic application of the Jurisprudence of Original Intent in twenty years. Before you became a judge, you practiced almost exclusively in the federal tax area. Wasn't that an unusual training ground for your *Toxics* decision?

A. Unusual, perhaps, but not inadequate.

Q. Would you explain?

A. Sure. Tax lawyers routinely invoke "legislative intent,"⁵² which, as you probably know, is to statutory law what "original intent" is to constitutional law. You may have heard of the personal injury lawyer who when asked what he thought of the doctrine of *res ipsa loquitur*, replied, "In my law office, we think of little else." The same could be said of tax lawyers and "legislative intent." In fact, someone once said that they look at the Internal Revenue Code only if the committee

RAILWAYS IN THE UNITED STATES, 1850-1887, at 156, 200-13 (Bull. of U. of Wis., Economics and Political Science Series, Vol. VI, 1910).

50. *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837).

51. See R. BERGER, *FEDERALISM*, *supra* note 17, at 125 (concern about the free passage of goods, not of people, prompted the commerce clause).

52. For example, a Lexis search reported that 364 federal tax cases for the period 1981 to 1988 referred to "legislative intent."

reports are ambiguous.⁵³

Q. Doesn't the search for the legislative intent underlying the Internal Revenue Code's statutory language make tax lawyers uncomfortable?

A. Well, some novices can't tolerate ambiguity, but they soon drop out. Those who remain thrive on uncertainty. In this respect, successful tax lawyers are like surgeons.

Q. Did your attitude toward using legislative intent to construe the Internal Revenue Code change when you became a judge?

A. Not in the slightest. Have you ever read the Code, or any other recent federal statute? If you have, you would realize that construing specific provisions in light of their legislative intent is a liberating experience. If I couldn't look behind the letter of the law, I would resign my judicial commission.

Q. This "liberating experience" that you extol, does it also occur when you turn to constitutional issues?

A. In spades.

Q. Why do you say that?

A. Simple. In searching for the intent of Congress, tax lawyers and judges look almost exclusively to one source: the legislative committee reports. These reports are written by a legislative bureaucracy, tax committee staffs, who track the statutory language phrase-by-phrase, responding indirectly to questions raised by the Internal Revenue Service and practitioners and thereby helping to bridge the gap between the law on the books and the law in practice. Once in a while, of course, the Congress' intent is extracted from a floor debate, but that is often just a staged colloquy in which a committee chairperson responds to a member's request for clarification by reading a prepared answer. Occasionally tax courts even cite unofficial oral or written statements at a committee hearing. By and large, however, the committee reports are the sole source of legislative intent, and if they embody only a fictional intent, it is a fiction that Congress intends the courts to act on.

When you look for the framer's intent, the situation is totally different. No single source dominates. Judges must pick their way through the official records of the Philadelphia Convention of 1787, which contain no verbatim transcript of the debates; the unofficial notes taken by Madison and others; *The Federalist Papers*, which have no official sanction; the meager reports of the thirteen ratifying conventions; and a miscellany of letters, memoirs, pamphlets, early judicial decisions, Congressional debates, newspaper reports, and the like.⁵⁴ That's quite a challenge. If you want to see for yourself how fascinatingly diverse these sources are, spend an hour or two with the recently published five-

53. The same may be true of judges. See *Focht v. Commissioner*, 68 T.C. 223, 244 (1977) (Hall, J., dissenting) ("It has been said, with more than a grain of truth, that judges in tax cases these days tend to consult the statute only when the legislative history is ambiguous.").

54. See *infra* section III. B.; text accompanying notes 75-123.

volume work entitled *The Founders' Constitution*, by Philip B. Kurland and Ralph Lerner, which promises to be the most durable intellectual product of the 1987 Bicentennial of the Constitution.⁵⁵ Kurland and Lerner's compilation of the evidence reveals that the founders' intent does not have the consistency of homogenized milk.⁵⁶ It is more like a well-stocked pantry waiting for the imaginative chef.

Q. What you say, judge, puzzles me. I thought that the Jurisprudence of Original Intent was supposed to *constrain* judges, not to liberate them.

A. If that is what its exponents want, they would have been more guarded if they had first talked to some tax lawyers.

Q. Could you expand on that answer?

A. Read your Kurland and Lerner, and you will see what I mean.

C. *The Corporate Due Process Case*

Shortly after the *Alaska Toxics Case* restored the legal relationship between Congress and the states to the arrangement contemplated by the framers and the *Interstate Monopoly Case* forced Congress to relinquish the regulatory authority over interstate private enterprise that the framers never conferred on it, the *Corporate Due Process Case* applied the same potent legal corrective to limit the fifth amendment's guarantee of due process of law to natural persons, as originally intended by the framers. The court held that because both the language and history of the fifth amendment compel the conclusion that corporations are not "persons," they have no constitutional claim to procedural due process—a determination that obviously applies a fortiori to Johnny-come-lately substantive due process.

This arresting and unexpected application of the Jurisprudence of Original Intent was not the fruit of brilliant advocacy in a test case. Rather, it was the denouement of a run-of-the-mill lawsuit, brought by a lawyer who made so many errors in presenting his client's case that his incompetence would have warranted professional censure had it not been the proximate cause of his client's victory.

The case itself was simple. An inventor brought suit against a business corporation for damages for patent infringement. The plaintiff's lawyer, appearing in court for the first time, was unfamiliar with the facts, hazy about the law of evidence, inept in rephrasing questions, and perfunctory when cross-examining the defendant's witnesses. The

55. 1 P. KURLAND & R. LERNER, *THE FOUNDERS' CONSTITUTION* at xi (1987) ("[W]e are in effect seeking to recover an 'original understanding' of those who agitated for, proposed, argued over, and ultimately voted for or against the Constitution of 1787.").

56. *Id.* at xii ("We are loath to dangle before the reader yet another promise that the crooked will be made straight and the rough places plain; we promise, rather, complexity and complication.").

defendant's lawyer, a master in making the worse seem the better cause, exploited his opponent's ineptitude. As the trial progressed, the judge became increasingly convinced that occasional interventions from the bench—her usual tactic when unequal advocacy obscured the merits of a case—were not having their accustomed effect.

The judge then announced to counsel and the jury that "a lawsuit is not a gladiatorial contest, but a dispassionate search for justice." She indicated thereafter she would act as "counsel for the truth" to ensure that "the facts are accurately presented to the jury." When defense counsel asked what this announcement meant, the judge responded, "You'll find out soon enough, counselor. Proceed."

From then on, the judge repeatedly intervened. She examined witnesses on both direct and cross, suggested to plaintiff's counsel how his questions could be rephrased to surmount objections made by the defendant's lawyer, volunteered objections to defense counsel's questions, disparaged the credibility of the defendant's witnesses, and called the jury's attention to contradictions in the defendant's case. Moreover, immediately after the defense rested its case, the judge directed defense counsel to produce several employees for examination in camera. Finding that the employees knew facts helpful to the plaintiff's case, the judge brought them into court for questioning to supplement the plaintiff's case in chief. In charging the jury, the judge described this episode as "my fortunate last minute discovery of facts that the defendant tried to keep from you."

The jury found for the plaintiff, and awarded damages twice that claimed in the complaint, recommending that the court treble the damages as punishment for "the defendant's attempt to suppress the facts." The defendant's counsel moved to set aside the jury's verdict on the ground that the judge's conduct had violated his client's fifth amendment rights by denying it due process of law. After the parties briefed this issue, the judge acknowledged that her interventions during the trial "hovered on the edge of judicial impropriety." Nevertheless, she ruled that it was unnecessary to determine whether she had crossed the line because corporations are not covered by the fifth amendment's guarantee that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁵⁷

In so ruling, she made two points:

57. U.S. CONST. amend. V (emphasis added by the judge). The judge observed in an aside that the defendant would have to stand or fall on its fifth amendment claim to due process. She was tempted, she said, to augment that constitutional guarantee by holding that the federal courts are required to conduct trials in accordance with "the principles of natural justice," but such an extra-constitutional obligation would be an unprincipled exertion of raw judicial power in violation of the Jurisprudence of Original Intent. In support of this conclusion, she adduced the two-centuries-old observation of Justice Iredell: "The ideas of natural justice are regulated by no fixed standard; the

1. *The Requirement of Person*

The fifth amendment deals with five subjects: (a) indictment "for a capital, or otherwise infamous crime," (b) double jeopardy "of life or limb," (c) compulsion "in any criminal case to be a witness against himself," (d) deprivation of "life, liberty, or property without due process of law," and (e) the taking of private property "without just compensation."⁵⁸ The introductory term "person" indissolubly links the first four of these guarantees together. In striking contrast, the fifth guarantee, the only one of the five that can explicitly apply as readily and as fully to corporations as to natural persons, breaks with the phraseology used for the first four by stating, in impersonal terms, that "private property [shall not] be taken for public use, without just compensation."⁵⁹

Moreover, she said, the due process clause of the fifth amendment is the spiritual descendant of Magna Carta, which provided that "no *man* shall be disfranchised of any right, but by *due process of law*, or the judgment of *his peers*."⁶⁰ She then noted that a commentator recently outlined the import of due process when the Constitution was adopted and the evidence there compiled does not even hint at the inclusion of corporations but, to the contrary, suggests that due process can hardly embrace anything but natural persons.⁶¹ Confirming the validity of this analysis, the leading case that explicitly addressed this issue in the framers' day distinguished between "the word '*liberties*' which peculiarly signifies those privileges and rights that corporations have by virtue of the instruments that incorporate them, and is certainly used [in the North Carolina constitution] in contradistinction to the word '*liberty*' which refers to the personal liberty of the citizen."⁶² It is also noteworthy that the analogous "law of the land" guarantee of the Northwest Ordinance of 1787 is similarly confined to natural persons: "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land"⁶³

In giving scant attention to the constitutional status of corporations,

ablest and the purest men have differed upon the subject" *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredall, J., concurring).

58. U.S. CONST. amend. V.

59. *Id.*

60. 5 P. KURLAND & R. LERNER, *supra* note 55, at 313 (quoting Alexander Hamilton, Remarks on an Act for Regulating Elections, New York Assembly (Feb. 6, 1787) (emphasis added)); see also 4 W. BLACKSTONE, COMMENTARIES *416-17.

61. R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 17, at 193-200.

62. *University of North Carolina v. Foy*, 5 N.C. (1 Mur.) 57, 62 (1805) (emphasis in original).

63. 1 U.S.C. at XLVI (1982). For the relationship between "due process of law" and "the law of the land," see generally R. BERGER, GOVERNMENT BY JUDICIARY, *supra* note 17, at 195-200; Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pts. 1 & 2), 24 HARV. L. REV. 366, 460 (1911); Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 581 (1930).

the framers were, of course, creatures of their own era, as Justice Curtis noted when he lectured at the Harvard Law School in 1872-1873:

I suppose it may fairly be said, that neither the framers of the Constitution nor the framers of the Judiciary Act [of 1789] had corporations in view. They were so few at that time, so entirely unimportant, that it is probable they were passed over without any notice or consideration. I had the curiosity to-day to look into the first volume of the Special Laws of Massachusetts, which, at the time of the formation of the Constitution, was perhaps as wealthy a State, in proportion to its population, and as likely to have created business corporations, as any other; and I find that between the time when the Constitution of Massachusetts was formed, and the time when the Constitution of the United States was adopted and [the] Judiciary Act passed, the State of Massachusetts created but one private corporation, and that was the Marine Society of the town of Salem. There was no bank, no insurance company, of course no railroad corporation or corporation owning steamers, or any of those things which at this day are of such magnitude.⁶⁴

2. *Fourteenth Amendment Concerns*

The judge then adverted to decisions holding that corporations are encompassed by the due process clause of the fourteenth amendment.⁶⁵ At first blush, she admitted, this principle seems to imply that the due process clause of the fifth amendment, the constitutional precursor of the fourteenth amendment's due process clause, also covered corporations, despite the evidence to the contrary cited above. But she then turned to Professor Hurst, the premier historian of American law's adjustment to the business corporation, for an explanation of this initially surprising discrepancy:

Without violence to language, [the fourteenth amendment's] protection of "persons" could be extended *by fresh lawmaking* to cover corporations, and its protection of "liberty" and "property," to cover the functional integrity of corporate business. An important role of constitutional standards is to legitimate adapting legal order to social change. Prevailing opinion accepts such adaptation—particularly at the hands of the Supreme Court—where constitutional doctrine is shaped in conformity with facts recognized as relevant to deeply felt values. No social goal was dearer to the late-nineteenth-century United States than

64. B. CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 128-29 (1880); *see also* 1 J. DAVIS, ESSAYS IN THE EARLIER HISTORY IN AMERICAN CORPORATIONS 75-107 (1917); 2 *id. passim*.

65. The case usually cited for this principle is *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394, 396 (1886) (Court announced that it did not want to hear argument on the issue because all the justices agreed that the fourteenth amendment's due process clause applied to corporations.). *See also* *Sinking-Fund Cases*, 99 U.S. 700, 718-19 (1879). For an extended review of this curious episode, see FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, Vol. VII, 724 et. seq.

increase of economic productivity. By the 1890s the corporation had emerged as the principal instrument for organizing large business enterprise. *Extension* [by the courts] of the fourteenth amendment's protection to corporations as "persons" provoked no significant contemporary controversy.⁶⁶

The judge then pointed out that nothing in the case before her required her to comment on the legitimacy of the "fresh judicial lawmaking" that expanded the meaning of "persons" as used in the due process clause of the *fourteenth* amendment. She noted, however, that two members of the Supreme Court had questioned the decisions creating that expansion.⁶⁷ By contrast, the judge stated that she *did* have to rule on the corporate defendant's claim under the *fifth* amendment. Consequently, she concluded, "If I were to affix my imprimatur on this corporation's assertion that it is entitled to due process of law under the fifth amendment, I would do violence to the Jurisprudence of Original Intent and would deserve to be condemned as a judicial activist."

III

THE MANAGEMENT OF "ORIGINAL INTENT" LITIGATION IN THE FEDERAL COURTS

United States Court of Appeals, Special Panel Rules to Govern Constitutional Cases Involving the "Jurisprudence of Original Intent"

Case Management Order No. 1

Pursuant to the Supreme Court's rulemaking authority, the Court

66. J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, at 68 (1970) (emphasis added); see also *id.* at 69 (rejecting the "conspiracy theory" of the fourteenth amendment, spawned much later, which asserted that wily lawyers smuggled corporations into the fourteenth amendment's due process clause as a "capitalist joker"). For a more extended account of the conspiracy theory, see Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 *YALE L.J.* 371, 374 (1938). Nothing in Graham's thorough study conflicts with Professor Hurst's conclusion that the courts brought corporations into the protected class by "fresh lawmaking." See, e.g., *id.* at 386 n.50 ("[O]ne searches the debates in Congress and in the ratifying legislatures in vain for any intimation to the effect that the Fourteenth Amendment afforded prospective relief to corporations."); *id.* at 393 (Sen. Bingham's major speeches give no indication that he, the "principal alleged conspirator," regarded corporations as "persons" for due process purposes.); *id.* at 391, 396 (Only objects of Sen. Bingham's solicitude were natural persons.).

Although Berger's extensive analysis of the fourteenth amendment's due process clause does not explicitly discuss whether the term "persons" was intended at the outset to include corporations, R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 17, at 201-20, Berger implicitly supports Hurst's view that judicial lawmaking expanded "persons" to include corporations by emphasizing the framers' intent to "constitutionalize the Civil Rights Bill," a bill concerned with the rights of natural persons. See *id.* at 218-19.

67. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576-77 (1949) (Douglas, J., joined by Black, J., dissenting); *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting).

created this Special Panel in 1998. We serve as administrative supervisor of the federal court system, to facilitate the disposition at the trial and appellate levels of constitutional cases involving the Jurisprudence of Original Intent. We intend to discharge our delegated responsibility by issuing a series of Case Management Orders, as explained below, of which this is No. 1.

A. *Recent Developments in the Field of Original Intent*

Three of the earliest and best known Jurisprudence of Original Intent cases are the *Interstate Monopoly Case*, the *Alaska Toxics Case*, and the *Corporate Due Process Case*. These three seminal cases have inspired, by recent count, almost 2,500 federal district court suits seeking to apply the original intent principles to a wide variety of assertedly analogous situations. Moreover, parties in hundreds of other cases have asked the federal district courts to reverse landmark decisions in a diversity of areas, on the ground that these historic rulings cannot be reconciled with the framers' original intent. Although most of these cases are awaiting decision, they have attracted so much publicity that almost every one of them has elicited its own family of imitators.

This flood of original intent litigation has not confined itself to the Constitution and Bill of Rights. A rapidly growing wing of the Jurisprudence of Original Intent school of thought has looked to the Declaration of Independence as well. This group asserts that the Declaration of Independence is "an organic law," that is, "an organizing or constituting law," of the United States.⁶⁸ As such, the Declaration, it is argued, has substantive constitutional consequences—emanations from a penumbra, if one wants a metaphor.⁶⁹ For example, some states have recently

68. See, e.g., W. BERNs, *TAKING THE CONSTITUTION SERIOUSLY* 23 (1987):

In the various official compilations of American laws . . . the Declaration of Independence enjoys what might be seen as pride of place, ahead of the Articles of Confederation, the Northwest Ordinance, and the Constitution and its amendments. . . . Indeed, in more than one of these compilations—for example, in the 1970 edition of the United States Code—it is classified as one of the "Organic Laws of the United States."

An organic law is an organizing or constituting law, and the Declaration is the first such American law because, according to the political theory informing it, before there can be legitimate government, there must be a people, a people to institute it, and before there can be a people there must be a compact among persons who, by nature, are free and independent—which is to say, independent of each other.

See also Jaffa, Letter to the Editor, *COMMENTARY*, May 1988, at 6 (criticizing Judge Bork for failing to "display the slightest awareness that the principles of the Constitution are to be found in the Declaration of Independence" and emphasizing that natural rights and natural law "were the historic foundation of the historic Constitution"); Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States*, 10 U. PUGET SOUND L. REV. 351, 363-64 (1987) ("[T]he Declaration remains the most fundamental dimension of the law of the Constitution.").

69. See *Griswold v. Conn.*, 381 U.S. 479, 484 (1965) ([T]he early privacy cases suggest "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

required their school systems to instruct all pupils in "the Laws of Nature and of Nature's God,"⁷⁰ despite objections based on the first amendment (as applied to states by the incorporation doctrine—itsself a subject of attack). The defenders of the legislation argue that the first amendment is subordinate to the *paramount* instrument of our nationhood, the Declaration of Independence. In the same vein, a few school systems have amended the Pledge of Allegiance, over the objection of various religious groups, to describe our country as "one nation, under Nature's God."

Exponents of the organic or constitutional status of the Declaration of Independence have also seized on its statement that "all men are created equal,"⁷¹ asserting that this "truth" should be inculcated by an official national catechism, to be recited ceremoniously at suitable intervals by the citizenry. Legislation to this end has generated more than a score of lawsuits; even so, we may be looking only at the tip of the iceberg. Legislators in many states have been persuaded that the framers originally intended this "truth" to be more spacious than its naked language, and that its true meaning is "all men [women, and children] are created [and were intended by their Creator to remain] equal [from the cradle to the grave]."

With this exegesis, the revealed intent of "Nature's God" inspired several state legislatures to enact an array of uncompromisingly egalitarian laws, including equal pay for all employees and the abolition of inheritance.⁷² When these emanations from the language of the Declaration of Independence were unveiled, some members of the critical legal studies movement,⁷³ announced that "socialism is twentieth century Americanism" and, sub nom. The Tom Paine Brigade, joined the Jurisprudence of Original Intent movement. When these CLS shock troops entered by the front gate, a dozen self-styled "*Original* Original Intentionists" left by the rear, asking plaintively "What hath Nature's God wrought?"

The Declaration of Independence is also the foundation for several state court reinterpretations of the fifth amendment's "just compensa-

70. For a colonial precursor of this invocation of a higher law, see John Adam's reference to "rights antecedent to all earthly government . . . Rights, derived from the great Legislator of the Universe." C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 54 n.1 (1930) (quoting John Adams).

71. The Declaration of Independence para. 1 (U.S. 1776).

72. For a prescient recognition of the Declaration's egalitarian heart, see Ledewitz, *Judicial Conscience and Natural Rights: A Reply to Professor Jaffa*, 10 U. PUGET SOUND L. REV. 449, 470 (1987) ("Once we take the rights of persons seriously and the strengthening of free government as law's obligation, we cannot avoid asking about the rest of the rights of man: about economic rights—to shelter, food, clothing, and education . . .").

73. Who were already demoralized by their inability to read Professor Unger's books as fast as he was able to write them.

tion" clause. These courts ruled that the framers intended "just compensation" for private property taken for public use to be computed not by reference to the trumped-up prices of a mercantile bazaar, but instead pursuant to "the laws of Nature and of Nature's God," which embody a "just price" concept suitable to a society aspiring to be a world class City on a Hill.⁷⁴

On reviewing the major features of this unprecedented flood of litigation, we have concluded that our mission can be discharged most expeditiously by commissioning an orderly analysis of certain threshold issues common to all of the cases within our jurisdiction. Accordingly, we have identified two threshold issues that are inherent in virtually all of them: (1) what types of evidence can properly support judicial conclusions about the original intent of the framers;⁷⁵ and (2) what principles should determine whether earlier decisions, if now found inconsistent with the intent of the framers, should be reversed, qualified, or preserved. Case Management Order Number One will address these preliminary issues. To ensure that these issues are fully briefed and presented without intolerable repetition, we will shortly appoint a Special Master, with power to allocate responsibility for briefing and arguing the threshold issues among counsel in all of the cases on our calendar.

We turn now to the issues to be addressed at this preliminary stage of our proceedings.

B. Evidence Establishing Original Intent

In a preliminary perusal of the briefs and opinions in the cases subject to this Case Management Order, we have encountered quotations from a variety of letters, speeches, newspaper accounts, pamphlets, and other materials, which are offered as evidence of the framers' original intent. A few of these documents explicitly report or refer to debates at deliberative assemblies discharging official responsibilities. These documents are sometimes in the form of the author's recollection of the event itself, but more often they set out the author's own views, supported primarily or solely by his eminence or argumentative skill. Even when statements by individual members of a deliberative assembly are quoted or summarized, the documents almost never establish whether the speaker's views were accepted or endorsed by his colleagues or whether persons voting with him had their own independent (and possibly inconsistent) reasons for reaching the same result. Finally, the documents do

74. See *V. DEMANT, THE JUST PRICE* 29-30 (1930) (A producer "should receive what would fairly recompense him for his labour; not what would enable him to make gain, but what would permit him to live a decent life . . . appropriate to his class.").

75. This issue necessarily requires an analysis of the basic hermeneutic principles implicit in the Jurisprudence of Original Intent. See *infra* notes 99-104.

not substantiate if the intent manifested by the members of a particular deliberative assembly (for example, the Philadelphia Convention or an early state ratification convention) was shared by delegates to other later assemblies.

Therefore, we instruct the Special Master to arrange for a consolidated discussion by counsel of the criteria, principles, and presumptions that should govern the courts in determining whether specific statements commanded enough support from the speaker's colleagues to be characterized as a consensus. How, in short, are we to distinguish between the intent of *a* framer, and the intent of *the* framers?

We turn now to the special problems raised by references in the briefs and opinions to particular sources of information about the intent of the framers.

1. *The Philadelphia Convention's Official Records*

As every schoolchild knows, the Philadelphia Convention of 1787 conducted its proceedings under a secrecy rule, which provided:

That no copy be taken of any entry on the journal during the sitting of the House without the leave of the House.

That members only be permitted to inspect the journal.

That nothing spoken in the House be printed, or otherwise published, or communicated without leave.⁷⁶

Even before this secrecy rule was adopted, a proposal to permit members to call for a vote and have the votes recorded was rejected unanimously.⁷⁷ According to Madison's notes, a member objected to this proposal because "as the acts of the Convention were not to bind the Constituents it was unnecessary to exhibit this evidence of the votes."⁷⁸ Another representative felt that a record of the members' opinions "would be an obstacle to a change of them on conviction," and that if the records were later released, the voting recorded could "furnish handles to the adversaries of the Result of the Meeting."⁷⁹

76. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 (M. Farrand ed. 1911) (footnote omitted) [hereinafter RECORDS]. For complaints about the Philadelphia Convention's secrecy rule, see Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), *reprinted in 3 id.* at 76 (Jefferson regretted that the Philadelphia Convention "began their deliberations by so abominable a precedent as that of tying up the tongues of their members."); 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 170 (2d ed. 1881) [hereinafter ELLIOT'S DEBATES] (Patrick Henry addressing the Virginia Convention) ("[I]t would have given more general satisfaction, if the proceedings of [the Philadelphia] Convention had not been concealed from the public eye."). Cf. U.S. CONST. art. I, § 5, cl. 3 (Each House of Congress may withhold from publication such parts of its journal "as may in their Judgment require Secrecy.").

77. 1 RECORDS, *supra* note 76, at 10.

78. *Id.*

79. *Id.* The Convention's Journal records votes by states, not delegate-by-delegate. *E.g., id.* at 47.

The Convention might have allowed this gag rule to expire when it adjourned, but instead it renewed the rule after these comments:

Mr. King suggested that the Journals of the Convention should be either destroyed, or deposited in the custody of the President. *He thought if suffered to be made public, a bad use would be made of them by those who would wish to prevent the adoption of the Constitution—*

Mr. Wilson preferred the second expedient. [H]e had at one time liked the first best; but as false suggestions may be propagated it should not be made impossible to contradict them—⁸⁰

With only one dissent, the delegates then adopted a motion to deposit the journals and other papers of the Convention with its president, George Washington, "subject to the order of Congress, if ever formed under the Constitution."⁸¹ In compliance with this motion, the secretary of the Convention, "after burning all the loose scraps"⁸² (in what may have been the first paper-shredding episode in our nation's history), delivered "the Journal and other papers"⁸³ to George Washington. He in turn deposited them with the State Department. The documents remained there until 1818, when, pursuant to a joint resolution of Congress, they were collated by John Quincy Adams and published the following year.⁸⁴

In 1824, just five years later, counsel arguing *Gibbons v. Ogden* before the Supreme Court cited the journal.⁸⁵ Of course, both counsel and the courts in later years have relied regularly on the journal for authority.⁸⁶ Even so, we doubt the propriety of judicial reliance on these Convention documents in interpreting the Constitution. We therefore request counsel to address the issues set out below.

First, does the fact that two delegates to the Convention (and perhaps their colleagues) contemplated destruction of the Convention's official records conflict with the courts' use of these records as evidence of meaning of the Constitution?

80. 2 *id.* at 648 (emphasis added) (footnote omitted).

81. *Id.* Rossiter concluded that the "veil of secrecy never did get lifted more than an inch or two during the struggle for ratification." C. ROSSITER, 1787: THE GRAND CONVENTION 283 n.* (1966). If this is correct, this may have been the first and last time in American history when the deliberations of a large governmental assembly were not leaked promptly to the press.

82. Letter from William Jackson to George Washington (Sept. 17, 1787), reprinted in 3 RECORDS (rev'd ed. 1966), *supra* note 76, at 82.

83. *Id.*

84. 1 *id.* at xi-xii; see also Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 6-9 (1986) ("[T]he journal, as published by John Quincy Adams . . ., [is] a reliable text.").

85. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 86 (1824) (Mr. Emmett, for the respondent).

86. See generally tenBroek, *Use By the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 437 (1938) (overview of cases in which the Supreme Court relied upon the debates and proceedings of the constitutional and ratifying conventions in formulating opinions).

Second, if the framers' original intent was to sanction use of the documents as evidence of the meaning of the Constitution, would they have vested Congress with discretion to unveil the documents or preserve their secrecy according to the wishes of a transitory legislative majority? Counsel are requested to consider whether judicial reliance on documents that could be suppressed or released at the discretion of Congress would constitute a de facto method of amending the Constitution without complying with the formal amendment procedure prescribed by article V.

Third, counsel should consider a commentator's recent statement: "As has often been noted, if [the record of the Convention] had come to light at the time of the ratification debates, the Constitution would never have passed."⁸⁷ In conjunction with that observation and assuming *arguendo* that the documents would otherwise be admissible, can courts properly rely on documents that were deliberately withheld from the ratifiers lest "a bad use would be made of them by those who would wish to prevent the adoption of the Constitution."⁸⁸ Counsel should remember that the suppression of the Convention's documents after its adjournment entailed a quadruple concealment: (1) from the states, which had chosen the delegates to the Philadelphia Convention; (2) from Congress, to which the draft Constitution was submitted and which had sole responsibility for forwarding it to the state ratifying conventions; (3) from "We the People," who were to choose the delegates to the ratifying conventions;⁸⁹ and (4) from the ratifiers. Can we presume that the framers dishonorably intended to sanction use of the suppressed documents once the perceived threat to ratification was foiled? Should we instead resolve this issue in their favor by assuming that they would have repudiated such a tactic?

In responding to these questions, counsel would do well to take account of Justice Black's objection to the use of a congressional committee's secret journal, which was belatedly proffered to establish the committee's intent in drafting the fourteenth amendment.⁹⁰ Needless to say, the issue is not whether Justice Black properly branded that particular instance as a breach of faith. Rather, the issue is how the courts should respond *if* a suppressed document is unveiled after the concealment has

87. G. WILLS, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* 157 (1984); cf. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 117 (1973) ("ratification was touch and go"); C. ROSSITER, *supra* note 81, at 276 (ratification "might have gone either way").

88. 2 RECORDS, *supra* note 76, at 648.

89. See Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 288 (1987) (discussing the People's lack of access to Philadelphia Convention's records).

90. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 86-87 (1938) (Black, J., dissenting).

served its intended function of disarming the opposition.⁹¹

Long before Justice Black raised this issue, Justice Story had asked: "If the Constitution was ratified under the belief, sedulously propagated on all sides, that such protection [against foreign competition] was afforded [by the commerce clause], would it not now be a fraud upon the whole people to give a different construction to its powers?"⁹² True, Story was concerned with an affirmative representation made to the ratifiers, but is fraud not fraud, whether accomplished by an affirmative representation or by a deliberate nondisclosure?⁹³

2. *Madison's Notes*

James Madison's notes of the Philadelphia Convention's debates, published in 1840 and cited a few years later by the Supreme Court,⁹⁴ have been "from the day of their publication until the present . . . the standard authority for the proceedings of the Convention."⁹⁵ It may, therefore, seem quixotic to question the propriety of using these notes as evidence of the framers' original intent. We would not be faithful to our oaths of office, however, if we did not request counsel to address the sources of our doubts, as summarized below.

91. We also invite counsel's attention to the authoritative documentary history, whose editor states that James Wilson's widely circulated defense of the Constitution "became, in effect, the 'official' Federalist interpretation of the Constitution, although that interpretation was at considerable variance with what Wilson and others had declared to be the purpose of the Constitution during the debates in the Convention." 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 26 (M. Jensen ed. 1976) [hereinafter DOCUMENTARY HISTORY]. Berger noted that several proposals to forbid federal interference with internal matters affecting only the states were voted down at Philadelphia. However, he observed that "when the Framers emerged from the secrecy of the Convention and were exposed to the sharp winds of public opinion, they reversed course"—meaning, evidently, that their post-convention assertions, on which the public relied in ratifying the Constitution, were inconsistent with their actions in Philadelphia. R. BERGER, *FEDERALISM*, *supra* note 17, at 68; *see also id.* at 70 n.110 (describing Madison's change in tone from his Convention position to his ratification position).

92. 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1084, at 29 (4th ed. 1873) (quoted with approval by R. BERGER, *FEDERALISM*, *supra* note 17, at 102).

93. As Raoul Berger has commented in an identical context (the failure to disclose a Convention decision to the people), "there can be no ratification without disclosure." Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296, 334 (1986).

Commenting on Bickel's suggestion that the framers of the fourteenth amendment concealed the objective of eliminating segregation because they feared that such an objective would endanger the amendment's ratification, Berger said, "There is not a shred of evidence that the framers employed double-talk to hoodwink the ratifiers. If they did, there was no ratification, because '[i]f the material facts be either suppressed or unknown, the ratification is treated as invalid.'" Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751, 782 (1984) (quoting *Owings v. Hull*, 34 U.S. (9 Pet.) 607, 629 (1835)).

94. *Passenger Cases*, 48 U.S. (7 How.) 283, 396 (1849); *see also id.* at 474 (Taney, C.J., dissenting).

95. 1 RECORDS, *supra* note 76, at xvi. For the history of Madison's Notes, see 1 THE PAPERS OF JAMES MADISON at xv-xxvii (W. Hutchinson & W. Rachal eds. 1962) [hereinafter MADISON PAPERS].

First, Madison's notes are not a verbatim record of the debates. A recent painstaking quantitative assessment of this distressing deficiency suggests that Madison reported no more than ten percent of an average hour's proceedings.⁹⁶ Furthermore, since Madison's original notes have not survived, it is impossible to determine "if [Madison] recorded all or nearly all of each session and then severely compressed the results or if he followed [the Virginia Convention stenographer's practice] of ignoring everything that seemed 'desultory' or 'irregular.'" ⁹⁷

In 1996, inspired by this study of Madison's notes, this court commissioned the Institute of Forensic Communications of the University of Bologna to assess the ability of skilled reporters to condense the proceedings of deliberative assemblies without distorting the speakers' intended messages. The Institute selected for this investigation three meetings: a law school faculty meeting, an executive session of a legislative body, and a postargument conference of a fifteen-member appellate court. To compare the results of the alternative methods that Madison might have used, two reports were prepared for each organization: one condensed from a verbatim transcript, the other based on notes taken by a participant-observer, who was instructed to concentrate on important matters and to ignore whatever was "desultory" or "irregular." Like Madison's notes, the resulting summaries reflected about ten percent of the original verbiage.

These summaries were then sent to the speakers, who were asked whether they accurately conveyed "your original intent as expressed in your speeches." Most of the replies from law professors and judges used terms like "butchered", "sabotaged", "unrecognizable", and "quasi-criminal mischief", but a few stated that the results were "marginally acceptable." One or two said that their remarks as condensed were "more forceful," though "less nuanced" than the originals. The legislators were markedly more tolerant, but this was because, as one respondent put it, "the summaries are at least better than the journalistic distortions we are accustomed to."⁹⁸ All members of the three groups, however, asserted that the reports of their colleagues' speeches were more faithful to the originals than were the reports of their own remarks; and more than half said that their colleagues' speeches were greatly improved by the mandatory pruning.

96. Hutson, *supra* note 84, at 34 (conceding that the estimate may be "impressionistic, unscientific, and flawed . . . [yet it] demonstrates that there is a significant quantitative difference between what Madison recorded and what was said at the Convention").

97. *Id.* at 34-35.

98. INSTITUTE ON FORENSIC COMMUNICATIONS, REPORT ON ABILITY OF SKILLED REPORTERS TO CONDENSE PROCEEDINGS OF DELIBERATIVE ASSEMBLIES ACCURATELY (forthcoming) (upon completion, the report will be available for inspection at the offices of the *California Law Review*, during business hours).

We invite counsel to comment on whether these results shed light on the fidelity of Madison's notes, and to commission additional empirical studies should they so desire.

Second, despite the significance of this concern, we are even more troubled by the fundamental issue of whether the framers intended their debates to be used in interpreting the Constitution. We wish to ensure that the Jurisprudence of Original Intent is not undermined by rushing too quickly from hermeneutics to exegesis. Accordingly, we direct counsel's attention to Madison's proclaimed reason for refusing to publish his notes during his lifetime, as he was often importuned to do. Madison stated, "As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the [Philadelphia] Convention can have no authoritative character."⁹⁹ Madison expressed himself similarly in Congress:

[W]hatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body [the Philadelphia Convention] could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.¹⁰⁰

We request counsel to discuss whether these statements (and others by Madison)¹⁰¹ accurately reflect a consensus prevailing in the framers' day that statements made during the Philadelphia Convention should not determine the meaning of the Constitution.¹⁰² In this connection, we call counsel's attention to Professor Powell's recent analysis of the interpretative principles accepted by the framers at the time of the Philadelphia Convention.¹⁰³ Moreover, if Madison had thought that his notes could

99. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228 (Philadelphia 1865).

100. 5 ANNALS OF CONG. 776 (1796). Madison also wrote,

Another error has been in ascribing to the *intention* of the *Convention* which formed the Constitution, an undue ascendancy in expounding it. Apart from the difficulty of verifying that intention it is clear, that if the meaning of the Constitution is to be sought out of itself, it is not in the proceedings of the Body that proposed it, but in those of the State Conventions which gave it all the validity & authority it possesses.

Letter of James Madison to N.P. Trist (Dec. 1831), *reprinted in* 3 RECORDS (rev'd ed. 1966), *supra* note 76, at 518 (emphasis in original).

101. See generally Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 935-941 (1985) (examples of Madison's expressed misgivings about using the framers' views to interpret the Constitution).

102. See generally Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988) (discussing the role of "private" and "public" intent in interpreting the Constitution).

103. Powell, *supra* note 101, at 902-13. For a summary of Powell's views, see Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1534 (1987) (reviewing R. BERGER, *FEDERALISM*, *supra* note 17):

unlock any of the Constitution's interpretative riddles, would he have treated them as his private property, secreting them for his lifetime, and thus enabling his widow to release them for this compelling public purpose only when and if Congress was prepared to pay the price?¹⁰⁴

Third, if we conclude that the official journal of the Philadelphia Convention cannot be used as an interpretative tool because it was deliberately withheld from the ratifiers,¹⁰⁵ how could we countenance use of Madison's notes to circumvent that constraint? Madison's notes and the Convention's official records were intertwined. Not only did other delegates regard him "as a semi-official reporter of their proceedings,"¹⁰⁶ to whom some of them supplied copies of their speeches and motions, but Madison himself corrected his notes after comparing them with the journal. Moreover, he sometimes copied journal reports of proceedings of which he had no personal record.¹⁰⁷

We are aware of numerous judicial references to Madison's notes, but none addresses the issue of propriety that, as adumbrated above, troubles us. In expressing our misgivings, we are concerned not with the use of the notes to embellish a decision reached on other grounds, but with their use in applying the Jurisprudence of Original Intent when they would make a difference in reaching a decision. As presently advised, therefore, we are disposed to exclude Madison's notes if the Philadelphia Convention's official papers are excluded.¹⁰⁸ It may, however, be feasible to expunge from Madison's notes all disclosures of material contained in

In my [Harvard Law Review] study, I concluded that regardless of whether the word [intention] was modified by "of the framers," or "of the states," or "of the Constitution," or was used absolutely, "intention" was an attribute or concept attached primarily to the document itself, and not elsewhere. The debates of framers and ratifiers, the attributed preferences of states or people, all of these were at most evidence of the Constitution's own intention. They were persuasive (or not), but—as in the common law tradition—not directly authoritative.

The "intent[ion]" of a document, I went on to argue, referred to the meaning an interpreter was entitled to derive from the document using the common law's techniques of construction. This meaning might or might not be the meaning consciously intended by the document's makers.

For Berger's criticism of Powell's hermeneutic principles, see Berger, "Original Intention" in *Historical Perspective*, *supra* note 93, at 334.

104. See 1 MADISON PAPERS, *supra* note 95, at xvii (Mrs. Madison decided to accept \$30,000 from Congress for her husband's papers, including the notes, although she originally wanted \$100,000.).

105. See *supra* text accompanying notes 103-108.

106. 1 RECORDS, *supra* note 76, at xvi.

107. *Id.*

108. We are, of course, aware that our doubts about the official Journal, see Mr. King's statement *supra* note 80, were created by Madison's notes; and at first blush it may seem inconsistent to use the Notes for this purpose, and then to suggest that both the official Journal and Madison's unofficial Notes should be excluded. In any event, if counsel thinks we are caught in a vicious circle, like the paradox of the Cretan who allegedly asserted that Cretans never tell the truth, we are willing to hear arguments on the point. If counsel undertakes this task, perhaps we can be guided through the complex network of THE PARADOX OF THE LIAR (R. Martin ed. 1970).

the Convention's official records. If counsel proffers such a redacted version of the notes, we direct the Special Master to determine whether the fruit of the poisonous tree has been scrupulously eliminated.

3. *The Ratifying Conventions*

It is easy to blur or even obliterate Madison's distinction between the limited role of the Philadelphia framers and the plenipotentiary authority of the state ratifiers (or, in the case of ratifiers bound by instructions, their constituents).¹⁰⁹ Both groups are often treated as "framers" and "founders" whose interpretative remarks are equally authoritative. Indeed, if a quantitative measurement of influence were feasible, it might demonstrate that the Philadelphia debates have influenced commentators and judges more than the obscure voices of the People, speaking through the ratifiers.¹¹⁰ In applying the Jurisprudence of Original Intent, however, we accept as fundamental Madison's emphasis on the paramount role of the ratifiers. But this is only the beginning of our interpretative journey into the past.

On September 28, 1787, Congress adopted a resolution which transmitted the Constitution, as drafted by the Philadelphia Convention, "to the several [state] legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof."¹¹¹ Pursuant to this resolution, the ratifiers met in thirteen separate state ratifying conventions. When counsel invokes the remarks of these delegates to establish the framers' original intent, how should we distinguish between corporate interpretations of the Constitution, which commanded the assent of a significant or controlling fraction of the delegates, and personal opinions, which were regarded by the rest of the delegates as idiosyncratic utterances? Can we pick and choose in accordance with our sense of what fits, like a historian who scans all possible evidence and then stakes his professional reputation on his reconstruction of an earlier

109. See *supra* text at note 115.

110. To be sure, the 1648 delegates to the state conventions, see 1 DOCUMENTARY HISTORY (1976), *supra* note 91, at 25, included some of the 55 Philadelphia framers, 3 RECORDS (rev. ed. 1966), *supra* note 76, at 557-59, and their influence may well have been proportionately greater than their number. Even so, when commentators and judges defer to these framer-ratifiers, it is almost always because they participated in preparing "the draft of a plan" at Philadelphia, not because they helped to give it "life and validity" by their votes at the state conventions. 5 ANNALS OF CONG., *supra* note 100, at 776 (statements of James Madison).

111. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, 69th Cong., 1st Sess. 1007 (1927) [hereinafter DOCUMENTS]. Article VII of the United States Constitution provides that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." U.S. CONST. art. VII. The Constitution does not specify how delegates to the conventions should be chosen. Congress, however, adopted the Philadelphia Convention's recommendation of September 17, 1787, that they should be "chosen in each State by the People thereof, under the Recommendation of its Legislature." See DOCUMENTS, *supra*, at 1005.

era? Or must we instead take all opinions supporting the ratification as equally competent evidence of the intent of the ratifiers, even though experience teaches that members of a deliberative assembly often vote in favor of measures even if they do not share, or even reject, the reasons stated by their more vocal colleagues?¹¹²

The Supreme Court, in interpreting an act of Congress, dealt with this very issue of individual opinions as early as 1845:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.¹¹³

If we eschew these austere interpretative principles, despite their proximity to the framers' era, and substitute today's more latitudinarian standards, we may be able to extract an intent of the ratifiers from their debates at each state convention.¹¹⁴ That, however, would take us from the frying pan into the fire. There were thirteen conventions, which ratified the Constitution in installments between December of 1787 and May of 1790. Ah, there's the rub. We must distill from these *separate* conclaves a *homogeneous* intent. When Chief Justice Marshall said that "it is a *constitution* we are expounding,"¹¹⁵ his message surely encompassed the proposition that the Court was expounding a *single* Constitution, not a series of legal arrangements, each reflecting the original intent of a different state's delegates.

We therefore request counsel to consider the implications of this

112. See R. BERGER, *FEDERALISM*, *supra* note 17, at 68 n.100 (Madison observed that "[n]o one acquainted with the proceedings of deliberative bodies can have failed to notice the uncertainty of inferences drawn from a record of naked votes.") (quoting 3 RECORDS (Rev. ed. 1966), *supra* note 76, at 520). Kurland and Lerner similarly noted the difficulty of reconstructing

the intentions of a widely scattered and long-since-dead generation of political actors. . . . [W]e are almost utterly in the dark about the manner in which arguments were made or received: the wink, the look of disgust, the detection of sophisms, are rarely matters of record and most often are matters of fanciful speculation by the reader.

1 P. KURLAND & R. LERNER, *supra* note 55, at xi.

113. *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845).

114. But see Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("[T]he intention of the legislature is undiscoverable in any real sense . . ."); Radin, Book Review, 48 YALE L.J. 1115, 1117 (1939) (determining will of legislature "not an exercise in logic or law but in creative imagination").

115. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

multiplicity of conventions for the Jurisprudence of Original Intent, and to address specifically the following issues:

1. Article VII of the United States Constitution provides that ratification of the Constitution by nine state conventions "shall be sufficient for the Establishment of this Constitution between the [ratifying states]." Does it follow that June 21, 1788, the date when New Hampshire, the ninth state to act, ratified the Constitution,¹¹⁶ is the closing date for determining the founders' original intent? In responding to this question, we invite counsel to consider Chief Justice Taney's oft-quoted statement that

as long as [the Constitution] continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke *when it came from the hands of its framers, and was voted on and adopted by the people of the United States.*¹¹⁷

Should we not treat the proceedings of the four laggard states, which ratified after June 21, 1788, as either cumulative (and hence superfluous) or irrelevant (because these states were presented with what was, so far as the framers' intent was concerned, a *fait accompli*, which they could accept or reject, but not vary)?¹¹⁸ To be sure, the United States as we now know it would have been unthinkable without New York and Virginia, the two principal laggards, but is it not equally unthinkable that any "intent" voiced at their conventions could alter the "intent" manifested at the conventions of the first nine states to act?

2. Similarly, we ask counsel to note that Delaware was the first state to ratify the Constitution.¹¹⁹ Can we accept, as evidence of the ratifiers' original intent, any views expressed at conventions that met subsequent to Delaware's ratification unless the proffered evidence is consistent with the understanding of the Delaware ratifiers? On this issue, we direct counsel's attention to the absence of any surviving records of the Delaware convention's proceedings.¹²⁰ Is the intent of the Delaware ratifiers less sacrosanct for being either temporarily or permanently lost? Should we adopt an irrebuttable presumption that Delaware's ratifiers implicitly agreed to accept as their own, retroactively, whatever intent

116. See DOCUMENTS, *supra* note 111, at 1024.

117. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857) (emphasis added).

118. Rhode Island, for example, did not ratify until May 29, 1790. See DOCUMENTS, *supra* note 111, at 1056. This was almost two years after Congress announced that the Constitution "has been ratified in the manner therein declared to be sufficient for the establishment of the same." *Id.* at 1062. If the intent of late ratifiers matters, how should we weigh the intent of Connecticut, Georgia, and Massachusetts, which did not ratify the first ten amendments until 1939?

119. See DOCUMENTS, *supra* note 111, at 1009.

120. See 3 DOCUMENTARY HISTORY (1978), *supra* note 91, at 44, 105. But see 1-3 DELAWARE CASES 1792-1830 (D. Boorstin ed. 1943) (compilation of early Delaware cases not previously published; perhaps the records of the Delaware convention, which are cited in many of these early Delaware cases, may also come to light at some future date).

might be manifested at conventions meeting *after* the Delaware convention disbanded? If so, must we apply this pig-in-a-poke principle to *all* post-Delaware conventions, so that the intent of the *last* ratifiers to act always trumps the intent of those who acted earlier?

4. *The Election of the Ratifiers*

At this point, we turn from the original intent of the ratifiers to the original intent of the People who elected the ratifiers. We have already quoted Chief Justice Taney's assertion that the meaning of the Constitution was fixed "when it came from the hands of its framers, *and was voted on and adopted by the people of the United States.*"¹²¹ In some cases, the local delegates procured their election by pledging to vote for or against ratification. Accordingly, such delegates were morally and politically obligated to discharge their commitments at the convention. Indeed, some were formally instructed by their constituents.¹²² Their ears were in effect closed to argument during the ensuing ratification debate.¹²³ In these cases, the elections were pro tanto *local* ratification conventions, and the elected delegates, no matter how eloquent their remarks at the later *state* convention, were merely agents for the voters who chose them.

These considerations raise a question that protagonists of the Jurisprudence of Original Intent have not explicitly examined. Should the intent manifested by the voters in these state electoral contests be considered in ascertaining the original intent of the makers of the Constitution? At the North Carolina Convention, for example, a delegate said, "[The Constitution] is no more than a blank till [sic] it be adopted by the people. When that is done here, is it not the people of the state of North Carolina that do it, joined with the people of the other states who have adopted it?"¹²⁴

If the Jurisprudence of Original Intent requires that courts ascertain the intent of the voters who selected the delegates to the state ratifying conventions, counsel could assist us by explaining how we should discharge this responsibility. The raw material before us includes some of the pamphlets, newspaper reports, speeches, and letters that bombarded the voters,¹²⁵ but we do not know what they judged to be wheat and what

121. *Dred Scott*, 60 U.S. at 426 (emphasis added).

122. For a description of instructions to some Connecticut delegates, see 3 DOCUMENTARY HISTORY (1978), *supra* note 91, at 405, 410-411.

123. See C. ROSSITER, *supra* note 81, at 287 (Debates at Pennsylvania convention "changed not a single mind.").

124. 4 ELLIOT'S DEBATES, *supra* note 76, at 25; see also W. BERNs, *supra* note 68, at 117 ("[I]t was the people on whose judgment everything ultimately depended.").

125. As Kurland and Lerner point out, "Being utterly dependent on the chance survival of arguments committed to paper, we are left in the dark concerning whatever else was thought but not said, said but not written, written but not saved, saved but not found." 1 P. KURLAND & R.

they discarded as chaff. And, alas, no enterprising journalists conducted exit polls to determine the voters' attitudes, as distinguished from the views of the propagandists seeking to influence them. How then are we to ensure that we do not overlook the People's intent?

5. *The Federalist Papers and Other Pamphlets*

We have alluded to the flood of propaganda favoring and opposing ratification directed at the American public and the delegates to the state ratifying conventions. A cursory review of the briefs filed in the original intent cases subject to this Case Management Order shows that *The Federalist Papers* is most frequently cited. We are concerned that exponents of the Jurisprudence of Original Intent may have overstated the influence of this single source on the ratifiers and the voters who selected them. We are aware, of course, of the distinction of *The Federalist Papers*, well summarized by Professor Rossiter's encomium:

This work has always commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States. It has been searched minutely by lawyers for its analysis of the powers of Congress, quoted confidently by historians for its revelations of the hopes and fears of the framers of the Constitution, and cited magisterially by the Supreme Court for its arguments on behalf of judicial review, executive independence, and national supremacy. It would not be stretching the truth more than a few inches to say that *The Federalist* stands third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history.¹²⁶

This court is not given to iconoclasm. Nonetheless, no matter how sacred *The Federalist* may be, we cannot allow ourselves to be overawed by it. For this reason, we request counsel to advise us about the issues discussed below, issues stimulated by the tendency of advocates in constitutional cases to quote extracts from *The Federalist Papers* as all but conclusive evidence of the founders' intent.

First, *The Federalist Papers* were not written *after* ratification, but during the ratification battle. Furthermore, they were addressed to the people of New York in an "endeavor to give a satisfactory answer to all the objections [to the draft Constitution] which shall have made their appearance, that may seem to have any claim to your attention."¹²⁷ Thus, even if *The Federalist Papers* reflected the views of some of the

LERNER, *supra* note 55, at xi. For a monumental collection of seemingly ephemeral material that *did* survive and *was* found, see 1 DOCUMENTARY HISTORY, *supra* note 91.

126. THE FEDERALIST PAPERS at vii (C. Rossiter ed. 1961). For early judicial citations to *The Federalist*, see Pierson, *The Federalist in the Supreme Court*, 33 YALE L.J. 728, 734-35 (1924).

127. THE FEDERALIST NO. 1, at 36 (A. Hamilton) (C. Rossiter ed. 1961).

Philadelphia framers, it cannot be taken as a report of what was intended by the *ratifiers* who had not yet voted.

Second, some advocates—perhaps implicitly conceding point one—link *The Federalist Papers* and the intent of the ratifiers together with a cause-and-effect argument that, as we understand it, runs as follows:

1. To induce ratification, *The Federalist Papers* assured the ratifiers that a particular provision of the proposed Constitution meant this or that.
2. This assurance was not an argument, but a representation.
3. Relying on this representation, the ratifiers voted in favor of adoption.
4. The ratifiers' original intent was, therefore, to endorse the meaning ascribed to the provision by *The Federalist Papers*.
5. Consequently, the Jurisprudence of Original Intent requires the courts to give effect to the ascribed meaning of the particular provision, lest they commit a fraud on the ratifiers.¹²⁸

On brooding about this interpretive strategy, we are struck by its protagonists' failure to offer evidence supporting step three in the argument. This step, necessary to convert the assurances in *The Federalist Papers* into representations that induced action, conflates, in our opinion, three premises. These premises are: (a) that the assurances in *The Federalist Papers* came to the attention of a significant number of ratifiers; (b) that the representation induced some previously opposed or undecided ratifiers to vote in favor of ratification; and (c) that these converts represented a critical mass whose votes were essential to victory.

We invite counsel to discuss whether we should require a factual showing in support of each of these sub-steps, as a condition to accepting the assurance-representation-fraud theory. In this connection, we call counsel's attention to Professor Rossiter's verdict on the influence of *The Federalist*:

The Federalist worked only a small influence upon the course of events during the struggle over ratification. Promises, threats, bargains, and face-to-face debates, not eloquent words in even the most widely

128. Berger may have inspired this interpretative strategy. He argued:

Construction of both the commerce and general welfare clauses should proceed from Madison's assurances in the *Federalist*. The federal jurisdiction, he stated in No. 39, "extends to certain enumerated objects only, and leaves to the States a residuary and *inviolable* sovereignty over all other objects." Particularizing in No. 45, he said federal power "will be exercised principally on *external* objects as war, peace, negotiations and foreign commerce. . . . The powers reserved to the several States will extend to all objects which . . . concern . . . the *internal* order . . . of the State." To repudiate such representations to the Ratifiers is, as Story wrote, to commit a fraud upon the American people.

R. BERGER, *FEDERALISM*, *supra* note 17, at 152 (emphasis in original) (footnotes omitted). For other assertions by Berger that statements in *The Federalist Papers* were "assurances" to the ratifiers, see *id.* at 14, 32-33, 63, 70-71, 101-02, 111.

circulated newspapers, won hard-earned victories for the Constitution in the crucial states of Massachusetts, Virginia, and New York. . . . The chief usefulness of *The Federalist* in the events of 1788 was as a kind of debater's handbook in Virginia and New York. Copies of the collected edition were rushed to Richmond at Hamilton's direction and used gratefully by advocates of the Constitution in the climactic debate over ratification.¹²⁹

In responding to our request, counsel should bear in mind that the nine states required for ratification had acted favorably before Virginia's "climactic debate over ratification" was resolved. Also, counsel should consider that a recent study of the ratification debate in New York, which was also a laggard state, concludes that "[d]espite the significant place *The Federalist* has assumed in American political thought, its impact on New York's reception of the Constitution was negligible."¹³⁰

We recognize how heavy the burden of proof will be if we insist upon evidence that the assurances in *The Federalist Papers* had the effects described by sub-steps (a) through (c) of step three. However, without such evidence, should we indulge in an irrebuttable presumption that every such assurance was, by itself, a sine qua non of ratification? One commentator has suggested¹³¹ that such a presumption would be tantamount to an order by the Librarian of Congress requiring the following warning to be affixed to all copies of *The Federalist Papers*:

RATIFIERS, READ THIS WORK AT
YOUR PERIL!

Take notice, that if the Constitution is ratified and
you desire thereafter an authentic exposition of your own
as-yet-unformed original intent,

YOU WILL HAVE TO READ THIS
WORK AGAIN!

The proposed warning may be a flight of fancy, but it is propelled by a serious idea, which counsel should discuss, viz., whether such an irrebuttable presumption is warranted.

Third, assuming *arguendo* that we can properly treat *The Federalist*

129. THE FEDERALIST PAPERS, *supra* note 126, at xi.

130. Kaminski, *New York: The Reluctant Pillar*, in THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 71-72 (S. Schechter ed. 1985).

131. See Bittker, *The Bicentennial of the Jurisprudence of Original Intent*, 77 CALIF. L. REV. 235, 272 n.131 (1989).

Papers as an authoritative guide to the meaning of the Constitution as understood and intended by the founders, we are troubled by a problem of chronology. *The Federalist Papers* were issued in eighty-five installments, starting before the Constitution was ratified by Delaware, the first state to act, and ending shortly after it was ratified by South Carolina, the eighth state to act. Our problem is illustrated by the assertion in several of the briefs in cases covered by this Case Management Order that "the Ratifiers were assured by *Federalist No. 83*" that the jurisdiction of the federal courts was confined to a certain area and that "consequently the Constitution excludes cases outside this area."¹³² Since eight of the requisite nine states had already acted before *Federalist No. 83* was published, we request counsel to discuss whether its assurance can be properly imputed to the early birds. If the assurances cannot be imputed, are we faced with the possibility that the ratifiers acted on different, possibly even on conflicting, assumptions about the meaning of the provision discussed by *Federalist No. 83*?

It may be thought that this is a freak issue, arising only because No. 83 was one of the last *Federalist Papers* to be published. However, we direct counsel's attention to the disturbing fact that five of the requisite nine states had ratified the Constitution by January 9, 1788, when substantially more than half of *The Federalist Papers* had not yet seen the light of day.

In short, when interpreting the Constitution, should we disregard (1) the early *Federalist Papers* because they appeared too early to reflect the intent of the *late* ratifiers, and (2) the late *Federalist Papers* because they appeared too late to influence the *early* ratifiers?

6. *Were the "Framers" Individuals or States?*

A final point. The original intent briefs that have come to our attention assume, without discussion or explanation, that the framers whose intent is controlling were the *individuals* who participated in making the Constitution. Counsel should remember, however, that the *states* selected the delegates to the Philadelphia Convention, that the Convention transmitted its handiwork back to the *states*, that article VII requires ratification by *state* conventions, and that the *states* determined the number and method of selecting the ratifiers. Was, then, the Constitution framed by the ratifying states rather than by their nominees and

132. These assertions seem to be paraphrases of Berger, who stated, As Hamilton assured the Ratifiers [in *Federalist No. 83*], judicial authority was confined to "certain cases *particularly specified*. The expression of those cases marks the *precise limits* beyond which the federal courts cannot extend their jurisdiction." Consequently, jurisdiction of cases "arising under" the Constitution impliedly excludes cases that do *not* arise thereunder.

R. BERGER, *FEDERALISM*, *supra* note 17, at 14 (footnotes omitted; emphasis added by Berger).

agents? If so, and if there were one hundred delegates at State A's ratification convention but only eleven at State B's, should we accord no more weight to the intent of all A's delegates than to the intent of State B's eleven delegates? In short, should we count corporate, not individual, noses?

We request, accordingly, that the Special Master instruct counsel to advise us whether the framers of the Constitution were the states, rather than the individuals through whom the states acted. If so, how should we ascertain the intent of these incorporeal bodies?

C. *The Role of Stare Decisis*

Most of the briefs in the avalanche of original intent cases that prompted this Case Management Order seem to accept the conventional theory that stare decisis rarely, if ever, protects earlier constitutional decisions from reexamination. Thus, the briefs attack and defend a host of judicial landmarks on the assumption that no matter how ancient a doctrine of constitutional law may be, it must stand or fall on its intrinsic merits. In denying "squatter sovereignty" to earlier decisions,¹³³ these briefs are consistent with the views Chief Justice Taney expressed in 1849 when dissenting in the *Passenger Cases*.¹³⁴ There, he cited several Supreme Court decisions supporting his position, but then pointedly refrained from claiming that the doctrine of stare decisis immunized them against reexamination. Instead, he announced:

I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.¹³⁵

Justice Brandeis subsequently supplied Taney's concession with both reasons and modern trappings:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of

133. See Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1, 15 (1986) ("No doctrine of judicial squatter sovereignty may run against the Constitution.").

134. 48 U.S. (7 How.) 283 (1849).

135. *Id.* at 470 (Taney, C.J., dissenting). For a characteristically pithy comment to the same effect, in a case involving statutory construction, see Justice Frankfurter's dissent in *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.¹³⁶

Stare decisis so feebly constrains the reexamination of constitutional issues that the court sometimes fails even to mention the doctrine when a long-standing earlier case is overruled.¹³⁷ The dissenters in these overruling cases have implicitly conceded the irrelevance of stare decisis by focusing on the merits of the earlier decision. The dissenters apparently agree with Chief Justice Taney that the "judicial authority [of such a decision] should . . . depend altogether on the force of the reasoning by which it is supported."¹³⁸

To be sure, stare decisis is not wholly without protagonists in constitutional litigation. Sometimes these protagonists quote Justice Roberts' arresting objection in 1944 to the Court's decision to overrule a nine-year-old decision in which he had spoken for a unanimous Court:

I believe it will not be gainsaid the [overruled] case received the attention and consideration which the questions involved demanded and the opinion represented the views of all the justices. It appears that those views do not now commend themselves to the court. . . . Their soundness, however, is not a matter which presently concerns me.

The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject.¹³⁹

Despite Justice Roberts' disclaimer of concern for the soundness of the overruled decision, his implicit invocation of stare decisis would have been more impressive had he invoked it to bless and preserve an earlier constitutional decision that he thought was both unsound and beyond legislative correction. Perhaps Justice Roberts would have been pre-

136. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting) (footnotes listing numerous cases that the Court later qualified or overruled, omitted); see also *United States v. Scott*, 437 U.S. 82, 101 (1978) (endorsing Brandeis' comments).

137. See, e.g., *South Carolina v. Baker*, 108 S. Ct. 1355, 1365-67 (1988) (overruling *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *United States v. Darby*, 312 U.S. 100, 115-17 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)); see also *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2121 (1988) (reexamining and endorsing 150-year-old precedent on the merits, without mentioning stare decisis).

138. *Passenger Cases*, 48 U.S. (7 How.) at 470 (Taney, C.J., dissenting); see also *Baker*, 108 S. Ct. at 1370 (O'Connor, J., dissenting).

139. *Smith v. Allwright*, 321 U.S. 649, 668-69 (1944) (Roberts, J., dissenting) (overruling *Grove v. Townsend*, 295 U.S. 45 (1935)). Query whether the last sentence of this extract implies that if the Court had reconsidered *Smith v. Allwright* during Justice Roberts' incumbency, he would have applied the doctrine of stare decisis to it, or to *Grove v. Townsend*.

pared to achieve "consistency in adjudication"¹⁴⁰ by systematically perpetuating earlier decisions that, by his lights, were devoid of constitutional legitimacy. If so, however, it is doubtful that he would have had many fellow travelers.

In light of this discussion, it is surprising to find that some of the most sedulous proponents of the Jurisprudence of Original Intent do not always rejoice at the Supreme Court's traditional willingness to overrule constitutional decisions that are "founded in error."¹⁴¹ Instead, they have suggested that some targets of their withering criticism might be preserved, though perhaps only after these cases have been officially branded as the product of judicial tyranny and thus sterilized against metastasizing. Judge Bork, for example, has asserted that "a judge with an original intent philosophy . . . needs a strong theory of precedent to keep from getting back into matters that are long settled, even if incorrectly settled."¹⁴² Without describing his theory of stare decisis in detail, he illustrated its results as follows:

This Nation has grown in ways that do not comport with the intentions of the people who wrote the Constitution—the commerce clause is one example—and it is simply too late to go back and tear that up.

I cite to you the legal tender cases. These are extreme examples admittedly. Scholarship suggests that the Framers intended to prohibit paper money. Any judge who today thought he would go back to the original intent really ought to be accompanied by a guardian rather than be sitting on a bench.¹⁴³

Judge Bork also cited *Shelley v. Kraemer*¹⁴⁴ as a case to be left alone, not because it has become an ineradicable part of the nation's institutions, but for the opposite reason. He stated,

In fact, *Shelley* against *Kraemer* has never been applied again. It has had no generative force. It has not proved to be a precedent. As such, it is not a case to be reconsidered. It did what it did; it adopted a principle which the Court has never adopted again. And while I criticized the case at the time, it is not a case worth reconsidering.¹⁴⁵

Although Raoul Berger has not explicitly endorsed Judge Bork's

140. *Id.* at 670 (Roberts, J. dissenting).

141. *Passenger Cases*, 48 U.S. (7 How.) at 4700 (Taney, C.J., dissenting).

142. *Hearings Before Senate Comm. on the Judiciary 100th Cong., 1st Sess. Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Part 1* at 159 (1987) [hereinafter *Hearings*]. Foreshadowing this comment, Judge Bork's prepared introductory statement observed that "[r]espect for precedent is a part of the great tradition of our law, just as is fidelity to the intent of those who ratified the Constitution and enacted our statutes." *Id.* at 76.

143. *Id.* at 84-85; see also Oaks, *Judicial Activism*, 7 HARV. J.L. & PUB. POL'Y 1, 10 (1984) ("On the subject of stare decisis, it is remarkable that so few interpretivists grapple with how to square improvements in theory with the reality of public expectations and the constraints of stare decisis.").

144. 334 U.S. 1 (1948).

145. *Hearings*, *supra* note 142, at 86.

view, he has similarly conceded that not all decisions flouting the framers' original intent need be extirpated:

Intellectual honesty . . . constrains me to be prepared to overrule all decisions that departed from the original design

But while decisions can be overruled, past events are not so easily undone. Like poured concrete, they have hardened, so that overruling decisions cannot restore the status quo ante. . . . But to accept unerasable ends on practical grounds is *not to condone continued employment of unlawful means*. The practical difficulty of a rollback cannot excuse the *continuation*, the ever-expanding resort to such unconstitutional practices. "Go and sin no more" does not signify acceptance of illegitimate acts, but counsels, rather, do not continue to apply unconstitutional doctrine in ever-expanding fashion.¹⁴⁶

Applying the Biblical injunction to "go and sin no more" to *Brown v. Board of Education*, Berger acknowledges that "blacks cannot be forced back into a ghetto," but he would halt "court-administered schools and prisons, affirmative action, busing, and the like."¹⁴⁷

Although these suggestions contain an unarticulated premise that the courts can properly perpetuate decisions violating the framers' intent, we know of no evidence that *the framers* intended this result. This is particularly true since the doctrine of stare decisis "has always been a doctrine of convenience," the application of which is "entirely within the discretion of the Court" since it is "inherently subjective."¹⁴⁸ Does stare

146. R. BERGER, *FEDERALISM*, *supra* note 17, at 179-80 (emphasis in original) (footnotes omitted); see also Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 486-87 (1983). If we understand him correctly, however, Berger would have the courts overrule, root and branch, *Bridges v. California*, 314 U.S. 252 (1941) (forbidding summary judicial punishment of publications preventing the proper discharge of judicial functions); *Baker v. Carr*, 369 U.S. 186 (1962) (judicially ordered reapportionment); *Williams v. Florida*, 361 U.S. 847 (1959) (12-person jury requirement); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of indigent migrants to welfare payments upon arrival in a destination state); and the death penalty cases, *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for accomplice to murder and rape, respectively, violates the eighth amendment's prohibition against cruel and unusual punishment). See R. BERGER, *SELECTED WRITINGS ON THE CONSTITUTION*, *supra* note 18, at 266-74. But cf. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 382 (1981) ("Stare decisis would, perhaps, perpetuate the core of the court's contextually based holdings: the privacy-autonomy-equality holdings in the sex-marriage-children area."); Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 7 (1979) (Reappointment principle is "far too deeply embedded in the constitutional order to admit of reassessment.").

147. R. BERGER, *DEATH PENALTIES*, *supra* note 17, at 83 n.29. Berger has similarly stated:

This is not the place to essay the massive task of furnishing a blueprint for a rollback. But the judges might begin by curbing their reach for still more policymaking power, by withdrawing from extreme measures such as administration of school systems—government by decree—which have disquieted even sympathizers with the ultimate objectives [of the desegregation decisions].

R. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 17, at 413.

148. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402, 403 n.11, 404 (1988); see also *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) (whether to follow stare decisis is "a question entirely within the discretion of the court"); cf.

decisis possess a backbone, or was it doomed at birth to suffer from the same incurable indeterminacy that originalists attribute to the positions propounded by their rivals? If we are to eschew judicial lawmaking, a prime objective of the Jurisprudence of Original Intent, can we properly employ an inherently subjective and entirely discretionary doctrine in deciding whether to preserve or overrule erroneous constitutional decisions?

Perhaps counsel can rescue us from this peril. We request the Special Master to coordinate a systematic exploration of the relationship between stare decisis and the fate of constitutional decisions that, in our view, cannot be reconciled with the framers' intent. The analysis should encompass, but not necessarily be limited to, the following issues:

1. Should the courts refuse to overrule constitutional decisions that flout the framers' intent if, as one thoughtful commentator has argued, correcting the error would trigger "massive destabilization . . . [that] would threaten the functioning of the federal government"?¹⁴⁹ Or, to the contrary, are these precisely the cases that should be at the top of the judicial corrective agenda? It is often stated that these decisions, though illegitimate, have produced results that are indispensable to the orderly functioning of our political order, the usual candidates for this accolade being *Brown v. Board of Education* and the *Legal Tender Cases*.¹⁵⁰ If that is true, cannot the courts confidently anticipate that legislation or a Constitutional amendment will promptly restore the status quo ante? Conversely, if we believe that Congress alone or Congress and three-quarters of the state legislatures, as the case may be, will *refuse* to restore the status quo ante, should we not then conclude that judicial correction of the error will *not* destabilize our constitutional order? Would not invoking stare decisis in these circumstances be merely a euphemism for judicial lawmaking? Of course, we intimate no answers to these questions, and will not do so before hearing from counsel.

2. If counsel urges us to perpetuate otherwise indefensible decisions lest we "threaten the functioning of the federal government,"¹⁵¹ how should we determine whether particular decisions qualify for immunity on this ground? Should a Congressional declaration of necessity be accepted as persuasive, or even as conclusive? Should we hear expert testimony, with or without the aid of a jury? Should we rely on our collective experience and judgment? If so, will we be perceived as kadis¹⁵²—kadis who sit on a bench in a court house rather than under a

Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988) ("[N]o one has a principled theory [of stare decisis] to offer").

149. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750 (1988).

150. See, e.g., Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 ("difficult to escape the conclusion that the Framers intended to prohibit" use of paper money as legal tender).

151. Monaghan, *supra* note 149, at 750.

152. See *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) ("This is a

tree in the open air, to be sure, but kadis nevertheless?

3. Turning from momentous decisions flouting the framers' intent to "small" decisions that suffer from the same defect, should they be preserved in order "to demonstrate—at least to elites—the continuing legitimacy of judicial review?"¹⁵³ Is it "perverse to defend the idea that the [Supreme] Court maintains its subservience to the fundamental law by upholding decisions that depart from that law?"¹⁵⁴ Or, to the contrary, is this an appropriate way "of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments," as Justice Harlan observed in an analysis of the "[v]ery weighty considerations" underlying the doctrine of *stare decisis*?¹⁵⁵ In all candor, we hope that counsel can help us separate those decisions that we can safely overrule without impairing public confidence in the rule of law from those that we should preserve in the interest of stability. In appealing for assistance, we do not preclude counsel from arguing that picking and choosing among decisions would be ineluctably discretionary and that we would best serve public confidence by according immunity either to *all* prior constitutional decisions or to *none*.

4. Assuming that some constitutionally incorrect decisions are to be preserved, we request counsel to discuss whether we should confine the otherwise unacceptable decision to its facts, or accord it more generous treatment. For example, assume that we conclude, contrary to *Wickard v. Filburn*,¹⁵⁶ that the power of Congress to regulate interstate commerce does not authorize the Department of Agriculture to impose penalties on farmers who exceed their allotted marketing quota by raising excess wheat for family consumption. We might decide that, for example, the impact of home-consumed produce on interstate commerce is too insubstantial or, more broadly, that Congress is authorized only to regulate state-imposed restrictions on interstate commerce.¹⁵⁷ If *stare decisis* is to shield this decision despite our disagreement with its reasoning and conclusion, should we continue to apply it even if Congress significantly changes the underlying statute by tripling the penalty or adding a criminal sanction, for example? In the same vein, should we subject other persons and businesses to analogous federal laws (for example, miners who extract excess minerals or banks with excess branches) if we believe

court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.").

153. Monaghan, *supra* note 149, at 752.

154. *Id.*

155. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970). Following this analysis, Justice Harlan, speaking for a unanimous court, overruled a prior decision because such reconsideration could not be "as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason." *Id.* at 405.

156. 317 U.S. 111 (1942). For criticism of this case for departing from the framers' intent, see R. BERGER, *FEDERALISM*, *supra* note 17, at 148-51.

157. For a similar analysis, see the discussion of the *Interstate Monopoly Case*, *supra* section II.A. and text accompanying notes 21-29.

that the Court that decided *Wickard v. Filburn* would have applied its rationale to these activities?

5. Should we apply a principle of repose to judicial assumptions about the meaning of the Constitution that have been long accepted but never explicitly endorsed by the courts if those assumptions are, in our view, inconsistent with the framers' intent? The *Corporate Due Process Case*¹⁵⁸ illustrates our quandary. The right of corporations to procedural due process was so entrenched in the conventional legal wisdom, even though no decision *explicitly* endorsed this right, that the issue was "off the agenda"¹⁵⁹ for more than two centuries.

If lawyers believed for so many decades that they could not possibly challenge these assumptions successfully, should we treat them as equivalent to judicial decisions in applying the doctrine of stare decisis?

6. Finally, we request counsel to supply any evidence that they can find on the framers' intent with respect to the foregoing issues. Accordingly, we remind counsel: (1) that Chief Justice Taney accepted the principle that the "judicial authority" of the Supreme Court's prior interpretations of the Constitution "should hereafter depend altogether on the force of the reasoning by which it is supported";¹⁶⁰ (2) that stare decisis has been characterized as an inherently subjective and entirely discretionary doctrine; and (3) that the Jurisprudence of Original Intent teaches that nothing can be more subversive of a written Constitution than judicial policymaking.

* * * *

Author's Postscript

While this Article was being edited for publication, the march of events made a postscript necessary.

On accepting appointment under Case Management Order No. 1, the Special Master engaged the leading academic expert on the framing of the Constitution to collate and analyze the material submitted by counsel. The consultant's initial report was, in the Special Master's words, a "model of dispassionate scholarship," and a treasury check in payment for his services was promptly issued. The consultant, however, refused to cash the check. He asserted that he could not be required to accept as legal tender the Federal Reserve notes that would be proffered by the drawee bank upon presentation of the check. To justify this astonishing claim, he submitted to the Special Master an extended memorandum, which concluded that the Supreme Court's decision in the *Legal Tender Cases*, legitimizing paper money, violated the original intent of

158. See *supra* section II.C.; text accompanying notes 57-67.

159. For this phrase, see Monaghan, *supra* note 149, at 744 ("Many constitutional issues are so far settled that they are simply off the agenda.").

160. *Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

the framers.¹⁶¹

The Special Master urged the consultant to reconsider his refusal to cash the check. The Special Master argued that the consultant, like other citizens, routinely receives and pays out paper money in his daily life. But the consultant rejected this appeal, arguing that he could not accept "unconstitutional scraps of paper" as compensation for his official services as the Master's Consultant on the framers' original intent.

The Special Master thought that this stand was quixotic at best and self-righteous at worst, but soon discovered not only that the consultant would not budge, but also that he would perform no more services until he received "constitutional" compensation for his initial report. Moreover, firing the consultant was no answer to the problem. When the Special Master sounded out other qualified academic experts, they all indignantly asserted that they would not even consider filling a vacancy created by discharging their high-minded colleague for adhering to principle.¹⁶²

Concluding that she could not move ahead with her assignment, either with the consultant or without him, the Special Master referred her dilemma to the Special Panel. She recommended that the Panel certify the following question to the Court: "Can the doctrine of the *Legal Tender Cases* be reconciled with the Jurisprudence of Original Intent?" The Special Master assumed that an affirmative answer to this question would induce the consultant to change his mind, while a negative answer would induce the Treasury to pay him in gold coin. The Special Panel quickly certified the question as recommended.

The Supreme Court, almost as quickly, referred the matter back to the Special Panel, instructing it to explore whether the framers contemplated that "[t]he judicial Power of the United States," as created by the Constitution,¹⁶³ would authorize the courts to render advisory opinions. In remanding, the Court noted that it had refused as early as 1793 to express opinions on legal issues in the absence of a justiciable case or controversy.¹⁶⁴ The Court added that the 1793 precedent antedated by three years the first explicit reference in an opinion to the framers' original intent.¹⁶⁵ The Special Panel inferred from this otherwise irrelevant

161. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871). For background, see 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES*, ch. 14, at 677-774 (1971); see also *supra* note 150.

162. The author regrets that he has not been able either to confirm or to disprove rumors in academic circles that the consultant and his colleagues are covert surviving members of the "non-interpretivist" school of constitutional exegesis, seeking to trash the Special Master's work.

163. U.S. CONST. art. III, § 1.

164. For advisory opinions, see generally P. BATOR, D. MELTZER, P. MISHKIN, D. SHAPRIO, HART & WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65-72 (3d ed. 1988); Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 247-50 (1988).

165. See *supra* note 2 and accompanying text.

detail of chronology that the Court might be willing to answer the certified question if advisory opinions could be squared with the Jurisprudence of Original Intent. The Special Panel subsequently directed the Special Master to report on this issue. She, in turn, called in the consultant, hopeful that the log-jam could now be broken.

The consultant, alas, would not rise above principle. He refused to perform any services, not even to investigate the constitutionality of advisory opinions, until he was paid for the work already completed.

Though the Special Master and Special Panel are legally authorized to proceed without the advice of the consultant, they are loath to do so, fearing that their impartiality will be questioned if they depart from procedures that they themselves created to ensure a searching and objective inquiry into politically charged issues. The result, in short, is that the current constitutional validity of the *Legal Tender Cases* cannot be settled without an advisory opinion from the Supreme Court, and that such an opinion cannot be obtained unless and until the status of the *Legal Tender Cases* is resolved.

As this goes to press, the log-jam is intact. Watch your electronic bulletin boards for future developments.